DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-262
Title: Virgil D. "Gus" Reichle, Jr., et al., Petitioners
v.
Steven Howards
Docketed: August 30, 2011
Linked with 11A47
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (09-1201, 09-1202)
Decision Date: March 14, 2011
Rehearing Denied: April 25, 2011

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 14 2011	Application (11A47) to extend the time to file a petition for a writ of certiorari from July 24, 2011 to August 25, 2011, submitted to Justice Sotomayor.
Jul 12 2011	Application (11A47) granted by Justice Sotomayor extending the time to file until August 25, 2011.
Aug 25 2011	Petition for a writ of certiorari filed. (Response due September 29, 2011)
Sep 20 2011	Order extending time to file response to petition to and including November 10, 2011.
Sep 29 2011	Brief amicus curiae of United States filed.
Sep 29 2011	Brief amici curiae of Colorado and Twenty Other States filed.
Nov 10 2011	Letter of November 10, 2011, from counsel for petitioners received.
Nov 14 2011	DISTRIBUTED for Conference of December 2, 2011.
Nov 17 2011	Letter of November 17, 2011, from counsel for respondent received. (Distributed)
Dec 5 2011	Petition GRANTED. Justice Kagan took no part in the consideration or decision of this petition.
Dec 19 2011	SET FOR ARGUMENT ON Wednesday, March 21, 2012.
Dec 28 2011	Record from U.S.D.C. for the District of Colorado is electronic.
Jan 3 2012	Record received from U.S.C.A. for10th Circuit. (1 box)
Jan 19 2012	Joint appendix filed. (Statement of costs filed)
Jan 19 2012	Brief of petitioners Virgil D. Reichle, Jr., et al. filed.
Jan 26 2012	Brief amicus curiae of United States filed.
Jan 26 2012	Brief amici curiae of International City/County Management Association, et al. filed.
Jan 26 2012	Brief amici curiae of FBI Agents Association, et al. filed.
Jan 26 2012	Brief amicus curiae of William G. Moore, Jr. in support of neither party filed.
Jan 31 2012	CIRCULATED.

Feb 16 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 20 2012	Brief of respondent Steven Howards filed. (Distributed)
Feb 24 2012	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Feb 27 2012	Motion for leave to file amicus brief filed by Rutherford Institute.
Mar 5 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Mar 13 2012	Reply of petitioners Virgil D. Reichle, Jr., et al. filed. (Distributed)
Mar 21 2012	Argued. For petitioner: Sean R. Gallagher, Denver, Colo.; and Sri Srinivasan, Principal Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: David A. Lane, Denver, Colo.
Apr 2 2012	Motion for leave to file amicus brief filed by Rutherford Institute GRANTED. Justice Kagan took no part in the consideration or decision of this motion.
Jun 4 2012	Judgment REVERSED and case REMANDED. Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Alito, and Sotomayor, JJ., joined. Ginsburg, J., filed an opinion concurring in the judgment, in which Breyer, J., joined. Kagan, J., took no part in the consideration or decision of the case.

PETITION FOR WRIT OF CERTIORARI

No. _____

In The
Supreme Court of the United States

VIRGIL D. REICHLE, JR., and DAN DOYLE,

Petitioners,

v.

STEVEN HOWARDS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, two Secret Service agents on protective detail, arrested respondent following an encounter with Vice President Richard Cheney. Petitioners had probable cause to arrest respondent, who in violation of 18 U.S.C. § 1001 falsely denied making unsolicited physical contact with the Vice President. Respondent thereafter brought a First Amendment retaliatory arrest claim against petitioners.

The questions presented are:

1. Whether, as the Tenth Circuit siding with the Ninth Circuit held here, the existence of probable cause to make an arrest does not bar a First Amendment retaliatory arrest claim; or whether, as the Second, Sixth, Eighth, and Eleventh Circuits have held, probable cause bars such a claim, including under *Hartman v. Moore*, 547 U.S. 250 (2006).

2. Whether the Tenth Circuit erred by denying qualified and absolute immunity to petitioners where probable cause existed for respondent's arrest, the arrest comported with the Fourth Amendment, it was not (and is not) clearly established that *Hartman* does not apply to First Amendment retaliatory arrest claims, and the denial of immunity threatens to interfere with the split-second, life-or-death decisions of Secret Service agents protecting the President and Vice President.

PARTIES TO THE PROCEEDING

Petitioners, Virgil D. "Gus" Reichle, Jr., and Dan Doyle, agents of the United States Secret Service, were defendants-appellants in the court below. Two other Secret Service agents, Daniel McLaughlin and Adam Daniels, were also defendants-appellants in the court below. A third Secret Service agent, Kristopher Mischloney, was dismissed in the district court. Respondent Steven Howards was the plaintiff-appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Virgil D. "Gus" Reichle, Jr., and Dan Doyle respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 634 F.3d 1131 and is reproduced in the appendix hereto ("App.") at App. 1-43.

The oral ruling of the United States District Court for the District of Colorado denying petitioners' motion for summary judgment is unreported and is reproduced at App. 46-61.

JURISDICTION

The judgment of the Tenth Circuit was entered on March 14, 2011. App. 1. The Tenth Circuit denied a timely petition for rehearing *en banc* on April 25, 2011. App. 62. On July 12, 2011, Justice Sotomayor extended the time to petition for certiorari to and including August 25, 2011. App. 70. The jurisdiction of the Tenth Circuit was based on 28 U.S.C. § 1291. App. 9. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law * * * abridging the freedom of speech * * * ."

18 U.S.C. § 3056 provides in relevant part:

> Powers, authorities, and duties of United States Secret Service
>
> (a) Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons:
>
> (1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect.
>
> * * *
>
> (c)
>
> (1) Under the direction of the Secretary of Homeland Security, officers and agents of the Secret Service are authorized to –
>
> * * *
>
> (C) make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has

committed or is committing such felony; * * *.

INTRODUCTION

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that the existence of probable cause bars a claim of retaliatory *prosecution* brought under the First Amendment. This case presents the question *Hartman* left open: whether probable cause bars a First Amendment retaliatory *arrest* claim. Six circuits are split on that question even after *Hartman*.

In this case, the Tenth Circuit held in a 2-1 decision that respondent could "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest." App. 34-35. In so doing, the Tenth Circuit sided with Ninth Circuit precedent. But the Second, Sixth, Eighth, and Eleventh Circuits have all held to the contrary that probable cause bars such a claim. This deep circuit split was expressly recognized by the court below. *See* App. 31 ("In the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests") (citing cases).

Judge Kelly dissented from this part of the panel majority's decision, concluding that "there is a strong argument that *Hartman v. Moore* applies not only to retaliatory prosecutions, but also to retaliatory arrests." App. 40 (citation omitted). The Tenth Circuit denied rehearing *en banc* over the objection of the

United States and six States participating as *amici curiae*.

The issue before the Court is one of great national importance. Not only will the decision below have a severe chilling effect on law enforcement generally, but could impact the safety of the President and Vice President. Petitioners, two Secret Service agents on protective detail, arrested respondent after he stated on a cell phone his intention to ask then-Vice President Richard Cheney "how many kids he's killed today," made unsolicited physical contact with the Vice President, and then lied about doing so. Respondent now seeks to hold petitioners personally liable for arresting him *with probable cause*.

The Tenth Circuit's rule, which is also the law of the Ninth Circuit, threatens to interfere with the split-second decisions of Secret Service agents that can mean the difference between the life and death of the President and Vice President. Arrests for probable cause will often be preceded by an expressive outburst, especially when the arrest follows an encounter with an elected official. While Secret Service agents will never allow concerns over potential legal liability to compromise their solemn and critical duty to protect the President, Vice President and presidential candidates, concerns over personal liability for making a probable cause arrest should not weigh into agents' decisions in the field.

STATEMENT OF THE CASE

The court below considered the following facts "in a light most favorable to" respondent Steven Howards. App. 3 n.1. On June 16, 2006, Howards was taking his son to a piano recital in Beaver Creek, Colorado. While walking through the Beaver Creek Mall, an outdoor shopping center, Howards saw then-Vice President Cheney shaking hands and having his picture taken with members of the public. Howards decided to approach the Vice President to protest the Administration's policies regarding Iraq. App. 3-4.

On that day, petitioners Gus Reichle and Dan Doyle were part of the Secret Service detail protecting Vice President Cheney. App. 3. The area was "unmagged," App. 8, meaning people had not been screened with a metal detector for weapons. Agent Doyle heard Howards state into his cell phone, "I'm going to ask him [the Vice President] how many kids he's killed today." App. 4. Agent Doyle acknowledged at his deposition that the comment "disturbed" him. App. 4.

Howards, who was holding a bag, App. 8, approached the Vice President and told him that his "policies in Iraq are disgusting." App. 4-5. The Vice President responded, "Thank you." App. 5. As he departed, Howards "made unsolicited physical contact with the Vice President," App. 18, by touching the Vice President's right shoulder with his open hand. App. 5. Agent Doyle told Agent Reichle, the Protective Intelligence Coordinator, about Howards'

"how many kids he's killed today" comment and Howards' interaction with the Vice President, including the physical contact. App. 6. Agent Reichle approached Howards, identified himself as a Secret Service agent, presented his badge, and asked to speak with Howards. App. 7. Howards initially refused and was "not cooperative." App. 7, 18. Reichle asked Howards if he had touched the Vice President, and Howards answered that he had not. App. 7. Howards admitted at his deposition that his answer "wasn't accurate." App. 7. Agent Reichle confirmed the falsity of Howards' statement with Agent Doyle, who had witnessed the encounter, and then arrested Howards. App. 8. Howards was detained for a few hours at the Eagle County Sheriff's Department. App. 8. Howards was charged with harassment under state law, but the state charges were dismissed and no federal charges were filed. App. 8-9.

Howards sued Agents Reichle and Doyle and other Secret Service agents under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging First and Fourth Amendment violations. App. 9. He alleged "that the Agents violated his Fourth Amendment rights by an unlawful search and seizure, and his First Amendment rights by retaliating against him for engaging in constitutionally protected speech." App. 9. After discovery, the agents moved for summary judgment on immunity grounds. The district court denied their motion, ruling that fact issues regarding the agents' immunity defense precluded

judgment as a matter of law. App. 9; *see also* App. 49-57.

The agents took an interlocutory appeal to the Tenth Circuit. Agents Reichle and Doyle argued on appeal that they were entitled to qualified immunity because, *inter alia*, they had probable cause to arrest Howards. They also argued that they were entitled to heightened or absolute immunity by virtue of their status as Secret Service agents protecting the Vice President. The United States, represented by the United States Department of Justice, filed a brief *amicus curiae* in support of the Secret Service agents and contended that the District Court had erred in denying qualified immunity. *See* U.S. CA10 *Amicus* Br. 11-30.

The Tenth Circuit affirmed in part and reversed in part. The panel unanimously rejected Howards' Fourth Amendment claim on the ground that the agents objectively had probable cause to arrest Howards. By a 2-1 vote, however, the panel held that probable cause was not a bar to Howards' First Amendment retaliation claim.

With respect to Howards Fourth Amendment claim, the Tenth Circuit held that "there is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001." App. 18. "Agent Reichle received information from three different Secret Service Agents that Mr. Howards had made unsolicited physical contact with the Vice President," yet

Howards "claimed, falsely, that he did not touch the Vice President." App. 18, 20. Indeed, as Howards "conceded in his deposition, he made factually inaccurate statements during his exchange with Agent Reichle." App. 18. Because the Tenth Circuit held that "the Agents had probable cause to arrest Mr. Howards for violating 18 U.S.C. § 1001," it did "not consider whether probable cause existed for any other offenses." App. 17-18 n.7.

Although the existence of probable cause barred Howards' Fourth Amendment claim, the panel majority held that probable cause was not fatal to Howards' First Amendment retaliatory arrest claim. App. 26. The majority observed that in *Hartman v. Moore*, this Court had held that "to prevail on a *retaliatory prosecution* claim, a plaintiff must plead and prove the absence of probable cause." App. 27 (emphasis in original) (citing *Hartman*, 547 U.S. at 259-60). Yet the majority announced that "[w]e decline to extend *Hartman*'s 'no-probable-cause requirement' to this retaliatory arrest case." App. 32. Thus, the majority held that Howards may "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest." App. 34-35.

The majority acknowledged that the existence of a circuit split on the question whether probable cause bars a First Amendment retaliatory arrest claim. It noted that "[i]n the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests." App. 31 (citing cases from the Sixth, Eighth, Ninth, and

Eleventh Circuits). By holding that probable cause does not bar a retaliatory arrest claim, the Tenth Circuit sided with the Ninth Circuit, *see* App. 31 (citing *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006)), and rejected the contrary majority rule. *See* App. 34 n.14 (noting that "some of our sister circuits disagree with us on this issue").

Despite *Hartman* and the inter-circuit split, the majority held that, at the time of Howards' arrest, Tenth Circuit law was "clearly established that an arrest made in retaliation of an individual's First Amendment rights is unlawful, even if the arrest is supported by probable cause." App. 31. The majority so held even while acknowledging that "a conflict among the circuits 'is relevant' to our determination of whether a right is clearly established." App. 34 n.14.

In a footnote, the Tenth Circuit rejected petitioners' argument that, as Secret Service agents protecting the Vice President, they were entitled to absolute immunity from Howards' claims. App. 13-14 n.6. In another footnote, the Tenth Circuit held that even though Howards' arrest comported with the Fourth Amendment it could still violate the First Amendment. App. 35 n.15.

Finally, the panel rejected Howards' First Amendment claim as against two other Secret Service agents, Daniel McLaughlin and Adam Daniels, on the ground that Howards had offered no evidence of

a retaliatory motive on the part of those agents. App. 36-39.

Judge Kelly concurred in part and dissented in part. In his view, "all of the agents should receive qualified immunity." App. 40. He noted that "[t]here is a strong argument that *Hartman v. Moore*, 547 U.S. 250 (2006), applies not only to retaliatory prosecutions, but also to retaliatory arrests." App. 40. And he disagreed with the panel majority's decision to "adopt[ ] a minority view based upon the rationale of *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006)." App. 41. Judge Kelly concluded that Agents Reichle and Doyle should have been granted qualified immunity because "when the arrest in this case occurred, the law simply was not clearly established (nor is it now) that *Hartman* applied only to retaliatory prosecutions and not retaliatory arrests." App. 41. He reasoned: "Given that the officers are deemed to have probable cause, no objectively reasonable officer on June 16, 2006 would be on notice that probable cause was insufficient to overcome claims of First Amendment retaliation." App. 41-42.

Agents Reichle and Doyle petitioned for rehearing *en banc*. The United States supported their petition. In its *amicus* brief, the Justice Department noted that "[t]his case presents a question of exceptional importance," that "the panel majority's decision misapplied" *Hartman*, that "the decision puts Secret Service agents" in an "untenable position," and that "the decision exacerbates a circuit conflict." U.S. CA10 *Amicus* Reh'g Br. 1. In addition, six States –

Colorado, Oklahoma, Utah, Wyoming, South Carolina, and Vermont – through their Attorneys General jointly filed an *amici* brief supporting rehearing *en banc*. The States advised the court below that the panel majority's decision "deepens a Circuit split by aligning Tenth Circuit law with the minority Ninth Circuit, and against the Sixth, Eighth, and Eleventh Circuits" and that "[t]he confusion wrought by the majority's opinion will have a significant impact on the *Amici* states." States CA10 *Amicus* Reh'g Br. 2.

The Tenth Circuit denied the petition for rehearing *en banc*. App. 62-63. The panel, however, granted petitioners' motion to stay the mandate. App. 44-45.

REASONS FOR GRANTING THE PETITION

This Court should review the decision below for four reasons. First, this Court should resolve the post-*Hartman* circuit split on the question whether probable cause bars a retaliatory arrest claim. In *Hartman*, this Court resolved a similar circuit split on the question whether probable cause bars a retaliatory prosecution claim. But the circuit courts are still at odds on the applicability of *Hartman* to arrest claims.

Second, the questions presented are of great national importance. The rule governing the Ninth and Tenth Circuits exposes Secret Service agents to the risk of burdensome litigation and potential personal liability each time they confront a potential threat to

the President, Vice President or other protectee. Because nearly every confrontation between a member of the public and the President or Vice President is attended by expressive activity, the minority view of the Ninth and Tenth Circuits undermines the ability of Secret Service agents on protective detail to react quickly and instinctively in the face of potential threats that could have national and historic consequences.

Third, the panel majority erred in denying qualified immunity to Agents Reichle and Doyle for making an arrest with probable cause. Because Howards was arrested based on probable cause, petitioners did not violate his First (or Fourth) Amendment rights. Furthermore, at the time of the arrest, it was not clearly established (and still is not clearly established) that *Hartman*'s no-probable-cause requirement did not apply to retaliatory arrest claims.

Fourth, the panel majority, in conflict with a Second Circuit decision, erred in failing to extend absolute immunity to Secret Service agents who make an arrest in furtherance of their duty to protect the President or Vice President under 18 U.S.C. § 3056.

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURT DECISIONS ON THE QUESTION WHETHER PROBABLE CAUSE BARS A FIRST AMENDMENT RETALIATORY ARREST CLAIM AFTER *HARTMAN*.

Before *Hartman*, the circuits were split over whether the absence of probable cause was a required element in retaliatory arrest and retaliatory prosecution cases. *Hartman* resolved the split as to prosecution cases, but the circuits are still divided about the application of *Hartman* to arrest cases. As one commentator wrote three years after *Hartman* was decided, "[r]etaliatory arrest case law is a mess, with some courts siding entirely with *Hartman*, others rejecting *Hartman* outright, and still others having yet to take a position." John Koerner, Note, *Between* Healthy *and* Hartman: *Probable Cause in Retaliatory Arrest Cases*, 109 Colum. L. Rev. 755, 775 (2009); *see also id.* at 755 (noting the "circuit split concerning retaliatory arrest claims"). This Court should grant certiorari to resolve this inter-circuit conflict. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

In *Hartman*, this Court observed that "[t]he Courts of Appeals have divided on the issue of requiring evidence of a lack of probable cause in 42 U.S.C. § 1983 and *Bivens* retaliatory-prosecution suits" and "granted certiorari to resolve the Circuit

split." *Hartman*, 547 U.S. at 256 (citation omitted). This Court held that in retaliatory prosecutions suits the "want of probable cause must be alleged and proven." *Id.* at 252.

After *Hartman*, the circuit courts remain split over whether the *Hartman* rule applies to retaliatory arrest claims just as it does to retaliatory prosecution claims. The Tenth Circuit panel opinion expressly acknowledged the circuit split: "In the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests." App. 31 (citing cases from the Sixth, Eighth, Ninth, and Eleventh Circuits). And in "declin[ing] to extend *Hartman*'s 'no-probable-cause requirement' to this retaliatory arrest case," App. 32, the Tenth Circuit noted that "some of our sister circuits disagree with us on this issue." App. 34 n.14. *Accord Moore v. Hartman*, ___ F.3d ___, 2011 WL 2739835, at *5 n.8 and *7 n.10 (D.C. Cir. July 15, 2011) (acknowledging circuit split regarding whether *Hartman* requires a no-probable-cause showing for retaliatory arrest claims).

The Tenth Circuit expressly embraced the Ninth Circuit's holding in *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006). *See* App. 31-32. As Judge Kelly noted, "[t]he court adopt[ed] a minority view based upon the rationale of *Skoog*." App. 41. *Skoog* involved First and Fourth Amendment retaliation claims brought against a police officer. While the officer was performing his duties, plaintiff Skoog recorded him without his consent with a video

camera. The Ninth Circuit held that the officer had probable cause to search Skoog's office and seize the camera and other equipment pursuant to a state statute making it unlawful to intercept oral communications without prior consent. Because the search and seizure was performed with probable cause, the Ninth Circuit rejected Skoog's Fourth Amendment claim. 469 F.3d at 1231. Turning to Skoog's First Amendment claim, The Ninth Circuit noted that "[w]hether a plaintiff must plead the absence of probable cause in order to * * * state a claim for retaliation is an open question in this circuit and the subject of a split in the other circuits." *Id.* at 1232 (footnotes omitted). The Ninth Circuit "conclude[d] that a plaintiff need not plead the absence of probable cause to state a claim for retaliation." *Id.* The *Skoog* court observed that in *Hartman* "the Supreme Court considered whether the absence of probable cause should be an element of a particular subcategory of retaliation claims: retaliatory prosecution claims." *Id.* at 1233. Yet the Ninth Circuit concluded that "the rationale for requiring the pleading of no probable cause in *Hartman* is absent here. This case presents an 'ordinary' retaliation claim." *Id.* at 1234.

The Ninth Circuit addressed *Hartman* and *Skoog* in a subsequent retaliatory arrest case, *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008). In *Beck*, the Ninth Circuit stated that "under *Hartman*, if a plaintiff can prove that the officials secured his arrest or prosecution without probable cause and were motivated by retaliation against the plaintiff's protected

speech, the plaintiff's First Amendment suit can go forward." *Id.* at 863-64. In a footnote, the *Beck* court cited *Skoog* for the proposition that "plaintiffs stating 'ordinary' retaliation claims posing less complicated causation problems than that addressed in *Hartman*, including actions concerning retaliatory searches, need not allege and show that absence of probable cause." *Id.* at 864 n.12 (quotation marks and brackets omitted) (citing *Skoog*, 469 F.3d at 1234).

The Tenth Circuit's holding that Howards can "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest," App. 34-35, conflicts with the majority rule established in several other circuit court decisions, including decisions by the Eighth, Eleventh, Sixth and Second Circuits. *See Koerner*, 109 Colum. L. Rev. at 755 ("In most circuits, a defendant police officer cannot be held liable for retaliatory arrest if the arrest was made with probable cause").

The decision below squarely conflicts with *McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010), which arose in a similar factual context. Plaintiffs showed up at campaign rally for President George W. Bush's re-election to protest the Iraq war. Plaintiff McCabe carried a sign which read "Bad War No More" and had a "W" with a slash through it. After failing to obey the repeated orders of Secret Service agents to move out of a restricted area, plaintiffs were arrested and charged with trespass under state law. Plaintiffs asserted, *inter alia*, First Amendment retaliatory arrest claims against two Secret Service agents.

The Eighth Circuit rejected plaintiffs' claims, holding that that "[l]ack of probable cause is a necessary element of all the claims McCabe and Nelson brought arising from the allegedly unlawful arrests." *Id.* at 1075. The court concluded that "there was arguable probable cause to arrest McCabe and Nelson for violating 18 U.S.C. § 3056(d), which prohibits a person from resisting a federal law enforcement agent who is performing protective services for the President." 608 F.3d at 1078. The Eighth Circuit indicated that, under its prior decision in *Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007), "a plaintiff asserting a *Bivens* or § 1983 claim for an alleged unlawful citation arising from the exercise of First Amendment rights must plead and prove a lack of probable cause for the underlying charge pursuant to the Supreme Court's decision in *Hartman v. Moore*." *McCabe*, 608 F.3d at 1075. *See also id.* at 1079.

The Eleventh Circuit has likewise applied the *Hartman* rule to claims for retaliatory arrest. In *Redd v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998), a sidewalk preacher arrested for disorderly conduct brought a First Amendment retaliatory arrest claim against police officers. The Eleventh Circuit rejected the claim on the ground that the officers had arguable probable cause to make the arrest. The court explained:

> Because we hold that the officers had arguable probable cause to arrest [the preacher] for disorderly conduct, we must hold that the

> officers are also entitled to qualified immunity from the plaintiffs' First Amendment claims. When a police officer has probable cause to believe that a person is committing a particular public offense, he is justified in arresting that person, even if the offender may be speaking at the time that he is arrested. Likewise, when an officer has *arguable* probable cause to believe that a person is committing a particular public offense, he is entitled to qualified immunity from suit, even if the offender may be speaking at the time that he is arrested.

Id. at 1383-84 (emphasis in original) (citations omitted).

Although *Redd* was decided before *Hartman*, the Eleventh Circuit has applied *Redd* in a post-*Hartman* decision. *See Phillips v. Irvin*, 222 Fed. Appx. 928 (11th Cir. 2007). The *Phillips* court held that, because Officer "Irvin had arguable probable cause to arrest [plaintiff] Phillips, we reverse the district court's denial of qualified immunity to Irvin on Phillip's First Amendment retaliation claim." *Id.* at 929. The Eleventh Circuit added that, "[u]nder our precedent Irvin only needed to establish *arguable* probable cause, which Irvin did." *Id.* (emphasis in original) (citing *Redd*, 140 F.3d at 1383).

The Sixth Circuit has applied *Hartman*'s no-probable-cause requirement to a First Amendment retaliatory arrest claim. *See Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006). Although the Sixth Circuit's

prior precedents did "not require [plaintiff] Barnes to prove a lack of probable cause in order to go forward with this First Amendment retaliation claim," *id.* at 718-719, the Sixth Circuit said that *Hartman* required such proof. The *Barnes* court said that "it is clear that the *Hartman* rule modifies our [prior] holdings * * * and applies in this case." *Id.* at 720. The Sixth Circuit held that "the defendants had probable cause to seek an indictment and to arrest Barnes on each of the criminal charges in this case. Barnes' First Amendment retaliation claim accordingly fails as a matter of law." *Id.*

In a subsequent case, *Kennedy v. City of Villa Hills*, 635 F.3d 210 (6th Cir. 2011), the Sixth Circuit stated in dicta that "*Barnes* governs the applicability of *Hartman* to claims of wrongful arrest only when prosecution and arrest are concomitant." *Id.* at 217 n.4. The *Kennedy* court said that a plaintiff who raises "an ordinary retaliation claim * * * may not need to demonstrate a lack of probable cause to succeed on his claim of wrongful arrest." *Id.* But the court said that it would "defer resolution of this question * * * because it does not decide this appeal." *Id.* The arresting officer "lacked probable cause for the arrest," and thus the Sixth Circuit "declin[ed] to decide whether probable cause is an element" of an ordinary retaliatory arrest claim. *Id.*

The decision below is also contrary to the Second Circuit's rule. In *Curley v. Village of Suffern*, 268 F.3d 65 (2d Cir. 2001), the Second Circuit rejected a First Amendment retaliatory arrest claim because, among

other reasons, the arrest was based on probable cause. After noting that one of the required elements of a retaliatory arrest claim is proof that "defendants' actions were motivated or substantially caused by [plaintiff's] exercise of [a First Amendment] right," the Second Circuit held that "because defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be taken." *Id.* at 73. The Second Circuit went on to say that "[s]ince plaintiff's arrest was made on probable cause and had no effect on his exercise of First Amendment rights, summary judgment was properly granted to defendants on this cause of action." *Id.* *Curley* preceded *Hartman*, but it remains the law in the Second Circuit. *See, e.g.*, *Morgan v. County of Nassau*, 720 F. Supp. 2d 229, 238 (E.D.N.Y. 2010) ("[I]f a police officer has probable cause to arrest a person, this will serve as a complete defense to any claim of First Amendment retaliation based on that arrest.") (citing *Curley*, 268 F.3d at 73).

In sum, there is a clear inter-circuit conflict, expressly acknowledged by the court below, on the question whether *Hartman*'s requirement that a retaliatory prosecution plaintiff must prove the absence of probable cause also extends to retaliatory arrest cases. In the decision below, the Tenth Circuit, aligning itself with the Ninth Circuit's decision in *Skoog*, held that the *Hartman* probable cause requirement does not apply to retaliatory arrest claims. The Tenth Circuit's holding conflicts with decisions of the Second, Sixth, Eighth, and Eleventh Circuits, which

have held that a retaliatory arrest plaintiff must demonstrate an absence of probable cause. The fact that recent Sixth and Ninth Circuit cases may draw a distinction between "ordinary" retaliatory arrest cases and other such cases is further reason for this Court to clarify the law governing retaliatory arrest claims, just as it did in *Hartman* concerning retaliatory prosecution claims.

II. THE QUESTIONS PRESENTED IN THIS CASE ARE OF GREAT NATIONAL IMPORTANCE.

Whether the absence of probable cause is a required element of a § 1983 or *Bivens* retaliatory arrest claim is an important and frequently recurring legal question. *See* States CA10 *Amici* Br. 3 (noting that "states have a vital interest in ensuring that their law enforcement officials remain free to perform their important duties, and thereby protect the safety and well-being of the general public, without the unnecessary fear or threat of lawsuits stemming from arrests made on the basis of probable cause"). But that question rises to the level of great national importance in a case that involves agents of the United States Secret Service protecting the President or Vice President.

There is nothing more debilitating to the Nation than the assassination of the President. "The Nation undoubtedly has a valid, even overwhelming, interest in protecting the safety of its Chief Executive." *Watts*

v. United States, 394 U.S. 705, 707 (1969) (per curiam). As Justice Breyer stated in *Rubin v. United States*, 525 U.S. 990 (1998), "[t]he physical security of the President of the United States has a special legal role to play in our constitutional system. * * * He is the head of state. He and the Vice President are the only officials for whom the entire Nation votes." *Id.* at 992 (Breyer, J., dissenting from denial of certiorari). It is an "obvious fact that serious physical harm to the President is a national calamity." *Id.* at 991. "And presidential security may turn on close questions of degree." *Id.* at 994.

Secret Service agents on protective detail must make split-second decisions that could have life-or-death – and historic – consequences. It is vitally important, therefore, that Secret Service agents act without hesitation. Indeed, this Court has recognized that government agents should not "err always on the side of caution because they fear being sued. Our national experience has taught us that this principle is nowhere more important than when the specter of Presidential assassination is raised." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quotation marks and citation omitted). Those who protect the President and Vice President have qualified immunity so that they will not hesitate in the face of potential threats to their protectees. *See Saucier v. Katz*, 533 U.S. 194, 209 (2001) (military police officer who seized protestor approaching the Vice President had qualified immunity in light of his "duty to protect the safety and security of the Vice President of the

United States from persons unknown in number"), *receded from on other grounds*, *Pearson v. Callahan*, 555 U.S. 223 (2009). And as Justice Scalia has observed, while an erroneous immunity analysis might be mere error in other contexts, such an error should not be permitted to stand "with respect to those who guard the life of the President." *Hunter v. Bryant*, 502 U.S. at 229 (Scalia, J., concurring).

As the United States explained in its brief filed in the court below in support of rehearing *en banc*, this case "presents a question of exceptional importance: whether a United States Secret Service agent protecting the Vice President who had probable cause to arrest a suspect for violating federal law might nevertheless be subjected to trial on a claim for personal money damages." U.S. CA10 *Amicus* Reh'g Br. 1. The Tenth Circuit's decision, in answering that question in the affirmative, "significantly erodes the protections of qualified immunity for Secret Service agents" and "will directly and adversely affect the sensitive and critical role that the Secret Service plays in protecting the President and Vice President." *Id.* at 5, 6. "It will impede Secret Service agents' ability to make on-the-spot judgments about threats to these officials without fear of having those judgments subject them to trial or civil liability." *Id.* at 6.

The decision below has the potential to affect the behavior of Secret Service agents, not only when they are traveling with the President and Vice President within the Tenth Circuit, but in every jurisdiction. Secret Service agents follow their charges all over the

country, often in the course of a single day, and therefore conform their conduct (and training) to a national standard. The Secret Service should not be expected to, and as a practical matter simply cannot, modify its operations depending on what circuit its agents happen to be in. *Cf. Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2086-87 (2011) (Kennedy, J., concurring, discussing need for uniform national standards for certain federal officials). Yet as the United States explained in support of *en banc* review, the Tenth Circuit's decision puts Secret Service agents "in the untenable position of applying two different standards when deciding whether to arrest a suspect, forcing them to consider not only whether an arrest is justified based on the objective facts known to them, but also whether any of the facts developing around them as they interact with a suspect might subject them to trial based on allegations concerning their subjective motivations." U.S. CA10 *Amicus* Reh'g Br. 1.

III. THE TENTH CIRCUIT ERRED IN DENYING QUALIFIED IMMUNITY TO AGENTS REICHLE AND DOYLE.

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Al-Kidd*, 131 S. Ct. at 2080 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818

(1982)). The doctrine of qualified immunity recognizes the legitimate "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow*, 457 U.S. at 807. The doctrine is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). *See also Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (recognizing that official immunity analysis considers the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action," which may include an "atmosphere of confusion, ambiguity, and swiftly moving events"), *modified by Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

A. Agents Reichle and Doyle Had Probable Cause to Arrest Howards.

As the Tenth Circuit held, "there is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001." App. 18. Just as the existence of probable cause is a bar to a retaliatory prosecution claim, probable cause ought to bar a retaliatory arrest claim. *See* App. 40 (Kelly, J., concurring and dissenting) ("There is a strong argument that *Hartman v. Moore* applies not only to retaliatory prosecutions, but also to retaliatory arrests.") (citation omitted). The *Hartman* doctrine should apply to Secret Service

agents because they perform a protective function under 18 U.S.C. § 3056 and should enjoy a presumption of "protective" regularity akin to prosecutors' presumption of prosecutorial regularity which undercuts the causal link between the content of the protester's speech and his arrest. *See Hartman*, 547 U.S. at 259-65.

The presumption of prosecutorial regularity is a common law construct, driven by the judiciary's respect for the commitment of prosecutorial decisions to the executive branch, and the "recognition that the decision to prosecute is particularly ill-suited to judicial review." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90 (1999). The conduct of Secret Service agents in their unique role as the President's and Vice President's personal bodyguards is similarly executive in nature and ill-suited for judicial review. Also, Secret Service agents' protective training is premised on the dynamics of the political protests frequently encountered by the President, Vice President and presidential candidates. Retaliatory arrest caselaw illustrates how ordinary police officers' encounters with familiar actors can lead to a dynamic in which retaliatory animus can be seen or inferred. *See, e.g., Skoog, supra*; *Barnes, supra*. Secret Service agents, by contrast, are specifically trained to deal with and routinely encounter anonymous crowds of vocal, sometimes strident political protesters criticizing the agents' protectee. An agent's only concern in these charged situations is being an effective bodyguard. This Court

can and should recognize that when a highly trained Secret Service agent decides to arrest someone who he believes poses an immediate threat to the President's safety, that decision deserves a similar presumption of regularity – *i.e.*, a presumption that the agent is acting out of genuine concern for the President's safety, rather than out of a desire to retaliate against a protester because of her political viewpoint or expression.

Applying *Hartman* to this type of arrest scenario would comport with the interests *Hartman* sought to protect. When a Secret Service agent makes an arrest to protect the President's immediate physical safety, and that arrest is supported by probable cause, the inquiry should end. As in *Hartman*, this Court should define the constitutional tort of retaliatory arrest in the Secret Service's § 3056 context to require claimants to plead and prove an absence of probable cause. Since Howards cannot do that here, Agents Reichle and Doyle did not deprive Howards of a constitutional right and enjoy qualified immunity.

B. The Law Was Not Clearly Established at the Time of Howards' Arrest.

The Tenth Circuit held in this case that probable cause is not a defense to a retaliatory arrest claim, despite *Hartman*. It also held that this was clearly established law on June 16, 2006. Not so.

This case arises from events that took place less than two months after this Court decided *Hartman*.

In light of the persistent split which led to *Hartman*, and the fact that the *Hartman* Court expressly reserved the question of retaliatory arrest claims for another day, it is fair to say that the retaliatory arrest and prosecution rules were far from clear at the time of
Howards' arrest. As Judge Kelly observed, Agents Reichle and Doyle would have been fully justified in expecting the Tenth Circuit to extend *Hartman* to the retaliatory arrest circumstance, as many other circuits have. *See* App. 41-43.

The Tenth Circuit panel majority spent seven reporter pages of dense legal analysis to explain how it perceived the law to be clearly settled post-*Hartman*, despite the circuit split. App. 24-36. The law of qualified immunity, however, looks to what a reasonable federal official would understand – it does not require a Secret Service agent to be a legal scholar. *See Hunter*, 502 U.S. at 229 (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law" – especially where "specter of Presidential assassination is raised"). So even if the Tenth Circuit majority's legal analysis is not seen as erroneous, the analysis is far too erudite to expect a pair of Secret Service field agents to have understood it as reflecting clearly established law in the Tenth Circuit.

Also instructive is this Court's holding in *Wilson v. Layne* that when an alleged constitutional tort takes place and a circuit split then develops over whether that tort is cognizable, the existence of the

split itself confirms that the law was not settled and qualified immunity applies:

> Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed [over whether the conduct at issue gave rise to a constitutional claim]. *If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.*

Wilson v. Layne, 526 U.S. 603, 618 (1999) (emphasis added, citations omitted).

Here, the Tenth Circuit expressly acknowledged the existence of a circuit split. App. 31-32. That observation should have been followed by the conclusion that qualified immunity necessarily applies under *Wilson*, since, as Judge Kelly noted in his dissent, there was every reason to believe that the Tenth Circuit would join the majority side of the split and hold Howards' retaliation claim uncognizable in light of the agents' probable cause to arrest. App. 41-43.

IV. THE TENTH CIRCUIT ERRED IN DENYING ABSOLUTE IMMUNITY TO AGENTS REICHLE AND DOYLE FOR ACTIONS UNDERTAKEN IN THEIR PROTECTIVE CAPACITY.

In the court below, Agents Reichle and Doyle argued that they are entitled to heightened or absolute

immunity because Howards' retaliatory arrest claim arose out of the performance of their duty to protect the Vice President under 18 U.S.C. § 3056. *See* Appellants Br. 15-17. The agents cited the Second Circuit's decision in *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), in support of their argument. The panel majority, however, summarily rejected the argument without discussing *Galella*. App. 13-14 n.6.

Although qualified immunity from damages liability is "the general rule for executive officials charged with constitutional violations," this Court's "decisions recognize that there are some officials whose special functions require a full exemption from liability." *Butz v. Economou*, 438 U.S. 478, 508 (1978). Such officials enjoy absolute immunity because of "the special nature of their responsibilities." *Id.* at 511. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) ("For officials whose special functions or constitutional status requires complete protection from suit, we have recognized the defense of 'absolute immunity.'"). In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), this Court held that the President of the United States "is entitled to absolute immunity from damages liability predicated on his official acts." *Id.* at 749.

Although absolute immunity is not "an incident of the office of every Presidential subordinate based in the White House," *Harlow*, 457 U.S. at 809, Secret Service agents safeguarding the President, Vice President, or other persons enumerated in 18 U.S.C. § 3056(a), perform the sort of "special functions" that

warrant "full exemption from liability." *Butz*, 438 U.S. at 508. That statute – captioned "Powers, authorities, and duties of United States Secret Service," authorizes the Secret Service "to protect" the President, Vice President, and certain other persons. 18 U.S.C. § 3056(a). Notably, the statute provides that Secret Service protection may *not* be declined by the President or Vice President. *Id.* The statute further authorizes Secret Service agents to "make arrests without warrant for any offense against the United States committed in their presence." *Id.* § 3056(c)(1)(C). Other federal statutes also reflect the overriding national policy to protect the life and physical security of the President. *See* 18 U.S.C. §§ 871, 1751, and 1752.

The "special functions" undertaken by Secret Service agents involve making split-second decisions to arrest persons that, to a highly trained agent, appear to pose a threat to the immediate physical safety of the President or other protectee. Indeed, Secret Service agents are trained to be able to react instinctively and reflexively in these situations – they do not have the luxury to deliberate, as prosecutors or judges do. Absolute immunity for Secret Service agents on protective detail is justified by "the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." *Nixon*, 457 U.S. at 752 n.32.

While the decision below rejected petitioners' request for absolute immunity in this case, the Second Circuit in *Galella* held that Secret Service

agents may not be held liable for making an alleged false arrest in connection with their protective responsibilities. Indeed, as then-Judge Ruth Bader Ginsburg noted in a subsequent case, *Galella* stands for the proposition that "United States Secret Service agents carrying out [their] special statutory duty [are] shielded by absolute immunity from common law false arrest liability." *Martin v. Malhoyt*, 830 F.2d 237, 249 n.31 (D.C. Cir. 1987).

Galella involved self-described "paparazzo" Ronald Galella, who hounded Jacqueline Kennedy Onassis and her children John and Caroline, all of whom were Secret Service protectees under 18 U.S.C. § 3056. The Secret Service interrogated and arrested Galella after he jumped into the path of young John Kennedy while he was biking in Central Park, creating concern for John's safety. 487 F.2d at 992. The Second Circuit held that the agents were entitled to "an absolute privilege" (*id.* at 993 n.5) as against Galella's false arrest and malicious prosecution claims. The court explained that "[t]he protective duties assigned the agents under [18 U.S.C. § 3056] * * * require the instant exercise of judgment which should be protected. * * * The issue in each case is whether the public interest in a particular official's unfettered judgments outweighs the private rights that may be violated. The protective duties of the agents on assignments similar to this warrant this protection." *Id.* at 993, 994 (footnotes and citation omitted). The Second Circuit added that "the duty of protecting the personages singled out by Congress as

in need of this extraordinary shield from likely harm is *toto coelo* different from the normal police function of arrest for law violation on warrant or on probable cause as in *Bivens*." *Id.* at 994 n.9. *See also Scherer v. Brennan*, 379 F.2d 609, 611 (7th Cir. 1967) (holding Treasury Department agents acting at direction of Secret Service "were immune from [plaintiff's] tort suit because their actions fell within the scope of their duties to protect the person of the President of the United States" under 18 U.S.C. § 3056), *cert. denied*, 389 U.S. 1021 (1967).

Galella supports the application of absolute immunity here. As personal bodyguards of the President, Secret Service agents must be able to make split-second decisions regarding whether to defuse potential threats to the President's personal safety by making arrests. These decisions should be accorded the widest possible latitude and not second-guessed by judges or juries.

Galella also provides an additional basis for qualified immunity. Presuming, *arguendo*, that this Court would not adopt *Galella*'s absolute immunity analysis here, the fact remains that *Galella* was the only circuit-level case on point in 2006, and its analysis and holding have never been questioned or criticized by this Court or the Tenth Circuit. Particularly in light of this Court's directive to consider immunity based on narrow case categories rather than at a high level of generality, *see Saucier*, 533 U.S. at 201; *Al-Kidd*, 131 S. Ct. at 2084, *Galella* appeared to supply the controlling precedent on Secret Service agents'

immunity in 2006. Thus, with *Galella* standing as authoritative precedent to the contrary, the Tenth Circuit could hardly conclude that the law was settled as conferring no immunity at all for Howards' retaliatory arrest claim. At a minimum, this legal landscape confers qualified immunity. *Al-Kidd*, 131 S. Ct. at 2080 (law must be clearly established); *Harlow*, 457 U.S. at 818 (same).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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634 F.3d 1131

Steven HOWARDS, Plaintiff-Appellee,

v.

Daniel McLAUGHLIN, in his individual and official capacity; Adam Daniels, in his individual and official capacity, Defendants-Appellants,

Virgil D. "Gus" Reichle, Jr., in his individual and official capacity; Dan Doyle, in his individual and official capacity, Defendants.

United States of America,
Amicus Curiae.

Steven Howards, Plaintiff-Appellee,

v.

Virgil D. "Gus" Reichle, Jr., in his individual and official capacity; Dan Doyle, in his individual and official capacity, Defendants-Appellants,

Daniel McLaughlin, in his individual and official capacity; Adam Daniels, in his individual and official capacity, Defendants.

United States of America,
Amicus Curiae.

Nos. 09-1201, 09-1202.

United States Court of Appeals,
Tenth Circuit.

March 14, 2011.

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Tony West, Assistant Attorney General, Washington, D.C.; David M. Gaouette, Acting United States Attorney, District of Colorado, Denver, CO; and Barbara L. Herwig and Teal Luthy Miller, Attorneys, Appellate Staff, Civil Division, Washington, D.C., filed a brief for Amicus Curiae.

Before KELLY, SEYMOUR, and LUCERO, Circuit Judges.

SEYMOUR, Circuit Judge.

Steven Howards brought the present action alleging, *inter alia*, that defendants Secret Service Agents unlawfully arrested him in violation of his First and Fourth Amendment rights. Defendants moved for summary judgment on the basis that they were immune from suit. Following a hearing on the merits, the district court concluded fact issues precluded the grant of qualified immunity as well as summary judgment. The case is now before us on defendants' interlocutory appeal from the district court's denial of

their motion for qualified immunity. For the reasons below, we REVERSE in part and AFFIRM in part.

I.

The present dispute arises out of a series of events occurring at the Beaver Creek Mall, an outdoor shopping center in Beaver Creek, Colorado.[1] On June 16, 2006, Mr. Howards accompanied his older son to a piano recital at the Beaver Creek Mall. That same day, Vice President Cheney also visited the Mall, along with his security detail, which included defendants Secret Service Protective Intelligence Coordinator Gus Reichle, and Secret Service Special Agents Dan Doyle, Adam Daniels, and Daniel McLaughlin (collectively the "Agents"). As the Protective Intelligence Coordinator, Agent Reichle's duties included interviewing individuals who were suspected of violating the law. Agents Daniels and McLaughlin were partnered together in the Counter Surveillance Unit, Vice Presidential Protective Division. They were in an undercover role that day, and they did not carry radios.

While en route to the recital hall, Mr. Howards made a call on his cellular phone. During this call, he observed the Vice President exit a grocery store and begin to speak with members of the public. Upon

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[1] For purposes of this appeal, we consider the facts in a light most favorable to Mr. Howards. *See, e.g., Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1256 n. 1 (10th Cir. 1998).

seeing the Vice President, Mr. Howards stated into his cell phone, "I'm going to ask him [the Vice President] how many kids he's killed today." Aplt. App. at 532.

Agent Doyle overheard Mr. Howards' cell phone conversation. He assumed that Mr. Howards was referring to the war in Iraq, and he considered it "[un]healthy" and "[not] quite right" for a person to make such a statement to the Vice President. *Id.* He has admitted the comment "disturbed" him. *Id.* He informed Agent McLaughlin about Mr. Howards' statement, advising him that they "should pay particular attention to a white male subject [Mr. Howards] wearing a green T-shirt . . . [because] he [had] overheard the subject state while speaking on the phone 'something to the effect of "I want to ask Cheney how many kids he had killed."'" *Id.* at 508. Agent McLaughlin replied, "Okay," because he believed it was "within [Mr. Howards'] bounds to do that." *Id.* at 425. Agent McLaughlin in turn relayed the information to Agent Daniels and informed him that "we need to keep an eye on . . . Mr. Howards." *Id.* at 413. All three agents began to monitor Mr. Howards.

Mr. Howards' son continued on to the recital; Mr. Howards remained behind to visit with the Vice President. As Mr. Howards waited for his turn, he observed the Vice President interacting with the gathering crowd, greeting patrons, shaking hands, and posing for photographs with onlookers. He then approached the Vice President and informed him that

his "policies in Iraq are disgusting." *Id.* at 491. The Vice President responded, "Thank you." *Id.* As he departed, Mr. Howards touched the Vice President's right shoulder with his open hand.[2] Although Agents Daniels, McLaughlin, and Doyle continued to monitor Mr. Howards and witnessed the touch, none of them were close enough to hear Mr. Howards' statements to the Vice President. Neither Agent Daniels nor Agent McLaughlin believed Mr. Howards' touch of the Vice President provided probable cause for arrest. *See id.* at 418, 428.

Special Agent Mike Lee, who was standing near the Vice President and in charge of the protective detail, overheard the verbal exchange. As Mr. Howards walked away, Special Agent Andrew Wurst, who was approximately fifteen yards from the Vice President when the touch occurred, approached Agent Lee. Agents Lee and Wurst agreed that a protective intelligence team should be sent to speak with Mr. Howards. Agent Wurst then asked Special Agent Oscar Rosales to send the protective intelligence team

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[2] The manner in which Mr. Howards touched the Vice President is disputed by the parties. Mr. Howards described the touch as an open-handed pat on the shoulder. Others, however, including the Agents, have described the touch as "push[ing] off" the Vice President's shoulder, Aplt. App. at 390, "a get-your-attention-type touch," *id.* at 395, a "slap," *id.* at 418, "a forceful touch," *id.* at 432, and a strike that caused "the Vice President's shoulder [to] dip[ ]," *id.* at 435. Because our review requires us to consider the evidence in the light most favorable to Mr. Howards, *see, e.g., Armijo*, 159 F.3d at 1256 n. 1, we will assume, without deciding, that his characterization is accurate.

to speak with Mr. Howards. After Agents Wurst and Rosales separated, Agent McLaughlin approached Agent Rosales to inquire whether a protective intelligence team was going to interview Mr. Howards.

Thereafter, Agent Gus Reichle, the intelligence coordinator, was dispatched to interview Mr. Howards as a person of interest in "an incident involving Vice President Cheney." *Id.* at 369. Although Agent Reichle had neither overheard the cell phone statement nor observed the actual interaction between Mr. Howards and the Vice President, Agent Doyle debriefed him as he approached Mr. Howards. Agent Doyle identified Mr. Howards as the person of interest and provided "a quick thumbnail sketch that he had overheard the subject on a cellular telephone whom [sic] stated, 'I'm going to ask him how many kids he's killed today.'" *Id.* at 371. Agent Reichle assumed that Mr. Howards' reference was to Vice President Cheney. *Id.*

Mr. Howards then left the vicinity and proceeded to join his family at the recital hall. Upon his arrival, Mr. Howards' wife asked him to accompany his younger son back to their condo. Mr. Howards and his son left the recital hall and began to walk towards the mall exit. On their way out, Mr. Howards and his son again entered the area where the Vice President was conducting his meet and greet. Before they reached the mall exit, his son wandered off, and Mr. Howards began to look for him.

During the search for his son, Mr. Howards was approached by Agent Reichle, who was dressed

in civilian clothes. Special Agents Daniels, Doyle, and McLaughlin remained nearby in a counter-surveillance role. Agent Reichle presented his Secret Service badge, identified himself, and requested to speak with Mr. Howards. Mr. Howards refused to speak with the agent and attempted to resume the search for his son. Agent Reichle stepped in front of Mr. Howards to prevent his departure and asked Mr. Howards if he had assaulted the Vice President. Mr. Howards pointed his finger at Agent Reichle, denied assaulting the Vice President, and informed the agent that "if you don't want other people sharing their opinions, you should have him [the Vice President] avoid public places." *Id.* at 494. Agent Reichle became "visibly angry" when Mr. Howards shared his opinion on the Iraq war. Mr. Howards again attempted to resume his search for his son.

In his deposition, Mr. Howards articulated the events that followed:

> A. At some point [Agent Reichle] said to me – I believe there actually – he also asked me if I touched the Vice President.
>
> Q. How did you respond to that?
>
> A. I believe I said I hadn't.
>
> Q. Okay. And that wasn't truthful, was it?
>
> A. That wasn't accurate.

Q. Do you recall him asking you any additional questions?

A. No. That's what I recall.

Id. at 495. Agent Reichle asked the nearby agents whether anyone had witnessed the physical encounter between Mr. Howards and the Vice President. Agent Doyle stepped forward and confirmed that he had witnessed the physical contact, and he performed a demonstration of the touch. Agents Daniels and McLaughlin confirmed that Agent Doyle's demonstration was an accurate recreation of the exchange.[3]

Based upon Mr. Howards' "premeditation, the conversation on the cell phone, the fact that Mr. Howards would not talk to [him], the fact that he's walking around with a bag in his hand in an unmagged [no metal detector] area, and the fact that [Doyle told him] that he had unsolicited contact," *id.* at 280, Agent Reichle decided to arrest Mr. Howards for assault on the Vice President. Agents Doyle, Daniels, and McLaughlin assisted in restraining Mr. Howards during the arrest.

Mr. Howards was turned over to the Eagle County Sheriffs Department and detained for several hours. Ultimately he was charged with harassment in violation of Colorado state law. The state prosecutor

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[3] Just as the parties dispute the nature of Mr. Howards' touch, there is disagreement as to whether Agent Doyle's recreation of the touch was accurate. This dispute is not relevant to our disposition of the appeal.

subsequently dismissed the charges, however, and no federal charges were ever filed.

Mr. Howards brought the present action pursuant to 42 U.S.C. § 1983 or, alternatively, under *Bivens v. Six Unknown Named Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), against Agents Reichle, Doyle, Daniels, and McLaughlin in both their official and individual capacities.[4] He alleges that the Agents violated his Fourth Amendment rights by an unlawful search and seizure, and his First Amendment rights by retaliating against him for engaging in constitutionally protected speech. At the close of discovery, all four defendants moved for summary judgment, arguing that qualified immunity shielded them from the present suit. Following a hearing on the merits, the district court determined that fact issues as to the availability of the qualified immunity defense precluded judgment as a matter of law to defendants. This interlocutory appeal followed.

II.

Our jurisdiction over the present appeal is governed by 28 U.S.C. § 1291, which provides general

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[4] Although Mr. Howards initially named only Gus Reichle as defendant, he subsequently amended his complaint to add defendants Secret Service Agents Kristopher Mischloney, Daniel McLaughlin, Dan Doyle, and Adam Daniels, in both their individual and official capacities. *See* 2d Am. Compl. at 1. The court later granted the parties' joint motion to dismiss defendant Mischloney. *See* Order of June 5, 2008, at 1.

jurisdiction over appeals from final decisions of lower courts. Since *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), the Supreme Court has construed § 1291's jurisdictional grant to extend to a class of collateral rulings that may be appealable as "final decisions," notwithstanding the absence of a final decision terminating litigation. *See Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

To be eligible for interlocutory appeal under *Mitchell*'s collateral order doctrine, the decision must be conclusive on the question it decides, must resolve important questions separate from the merits, and must be effectively unreviewable if not addressed through an interlocutory appeal. *Mohawk Indus., Inc. v. Carpenter,* ___ U.S. ___, 130 S.Ct. 599, 605, 175 L.Ed.2d 458 (2009). "Because a plea of qualified immunity can spare an official not only from liability but from trial, . . . [w]hen summary judgment is denied to a defendant who urges that qualified immunity shelters her from suit, the court's order 'finally and conclusively [disposes of] the defendant's claim of right not to stand trial.'" *Ortiz v. Jordan,* ___ U.S. ___, 131 S.Ct. 884, 891, 178 L.Ed.2d 703 (2011) (quoting *Mitchell,* 472 U.S. at 527, 105 S.Ct. 2806) (alteration in original). As a result, a district court's denial of a qualified immunity claim is eligible for appeal under the collateral order doctrine insofar as it turns on an issue of law. *Mitchell,* 472 U.S. at 530, 105 S.Ct. 2806; *see also Behrens v. Pelletier,* 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996)

("[S]ummary judgment determinations *are* appealable when they resolve a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity – typically, the issue whether the federal right allegedly infringed was 'clearly established.'" (second alteration in original) (citations omitted)). We may not review a denial of summary judgment, however, which "determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." *Johnson v. Jones*, 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

In this case, the district court found disputes of material facts as to the defendants' entitlement to qualified immunity and, accordingly, denied their motions for summary judgment. On appeal, Mr. Howards contends we lack jurisdiction to consider the appeal because "appellate review of the District Court's denial of qualified immunity would necessarily involve questioning the District Court's determinations of evidence sufficiency and genuine disputed material facts. . . ." Aple. Br. at 12. On the other hand, the Agents and the United States, as amicus, argue this appeal turns on pure questions of law that may be properly brought on interlocutory appeal.

We conclude we have jurisdiction to review this appeal, but only to the extent that the "defendant[s'] appeal of the denial of a motion for summary judgment is based on the argument that, even under the plaintiff's version of the facts, the defendant[s] did not violate clearly established law." *Johnson v. Martin*, 195 F.3d 1208, 1214 (10th Cir.1999).

Although as a general matter we review the district court's denial of summary judgment de novo, *see Martinez v. Beggs,* 563 F.3d 1082, 1088 (10th Cir.2009), our review in the qualified immunity context deviates from the standard applicable to other summary judgment decisions. *Id.* In considering the legal issues,

> [W]e review whether, under [the plaintiff's] version of the facts, [defendants] violated clearly established law. In making this determination, we must scrupulously avoid second-guessing the district court's determinations regarding whether [plaintiff] has presented evidence sufficient to survive summary judgment. Rather, we review only whether [defendants'] conduct, as alleged by [plaintiff], violated clearly established law.

Clanton v. Cooper, 129 F.3d 1147, 1153 (10th Cir.1997).

III.

The district court held that Mr. Howards stated a claim under 42 U.S.C. § 1983.[5] Section 1983 provides a federal cause of action against any person who,

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[5] Given our jurisdictional restraints, *see, e.g., Fogarty,* 523 F.3d at 1154; *Armijo,* 159 F.3d at 1259, we decline to review the district court's determination that Mr. Howards raised an issue of material fact as to whether the Agents participated in joint activity with state officials sufficient to render Mr. Howards' claim eligible for § 1983 relief.

acting under color of state law, deprives another of his federal rights. *Id.* Although § 1983 "create[d] a species of tort liability that on its face admits of no immunities," *Imbler v. Pachtman,* 424 U.S. 409, 417, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), the Supreme Court "has recognized that government officials are entitled to some form of immunity from suits for civil damages." *Nixon v. Fitzgerald,* 457 U.S. 731, 744, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982). "State government officials performing discretionary functions enjoy qualified immunity from liability under 42 U.S.C. § 1983." *Clanton,* 129 F.3d at 1153. "Such immunity is qualified in that it does not obtain when otherwise immune officials violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Armijo,* 159 F.3d at 1260 (quoting *Clanton,* 129 F.3d at 1153) (internal quotation marks omitted).

In this case, the Agents claim the doctrine of qualified immunity shields them from liability for the discretionary functions they performed "under color" of state law. *See Clanton,* 129 F.3d at 1153. "To act 'under color' of state law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." *United States v. Price,* 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966).[6]

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[6] The Agents also contend they are entitled to absolute immunity from Mr. Howards' claims. Although "some officials

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As we have noted, Mr. Howards claimed he was entitled alternatively to bring this action under *Bivens*. Because the "constitutional injuries made actionable by § 1983 are of no greater magnitude than those for which federal officials may be responsible," federal officials are accorded the same immunity for suits brought under *Bivens* as that which "is accorded state officials when sued for the identical violation under § 1983." *Butz v. Economou*, 438 U.S. 478, 500, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). The Supreme Court has explained that "it would be 'untenable to draw a distinction for purposes of

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perform 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability," the Supreme Court has been "'quite sparing' in recognizing absolute immunity for state actors in this context." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268-69, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (citations omitted). For executive officials generally, "qualified immunity represents the norm." *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Buckley*, 509 U.S. at 269, 113 S.Ct. 2606 (alteration in original) (quoting *Burns v. Reed*, 500 U.S. 478, 486, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991)) (internal quotation marks omitted). The Agents have failed to demonstrate a common law tradition, a Congressional purpose, or a decision from the Supreme Court or our circuit affording absolute immunity to law enforcement officers protecting executive officials, and we decline to extend such immunity here. *Cf. Hunter v. Bryant*, 502 U.S. 224, 227-28, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (per curiam) (granting qualified immunity to Secret Service Agents sued for violating the Fourth Amendment).

immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.'" *Harlow v. Fitzgerald,* 457 U.S. 800, 818 n. 30, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) (quoting *Butz,* 438 U.S. at 504, 98 S.Ct. 2894); *see also Hartman v. Moore,* 547 U.S. 250, 255 n. 2, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006) ("Though more limited in some respects not relevant here, a *Bivens* action is the federal analog to suits brought against state officials under [§ 1983]."). As a result, it is irrelevant for our qualified immunity analysis whether Mr. Howards' suit proceeds under *Bivens* or § 1983.

In qualified immunity cases at the summary judgment stage, the "plaintiff must demonstrate on the facts alleged (1) that the defendant[s] violated his constitutional or statutory rights, and (2) that the constitutional right was clearly established at the time of the alleged unlawful activity." *Swanson v. Town of Mountain View,* 577 F.3d 1196, 1199 (10th Cir.2009) (citing *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 815-16, 172 L.Ed.2d 565 (2009)). We have "the discretion to decide 'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'" *Id.* (quoting *Pearson,* 129 S.Ct. at 817-18).

"In showing that the law was clearly established, the plaintiff does not have to show that the specific action at issue had been held unlawful, but the alleged unlawfulness of the defendant's conduct must

be apparent in light of preexisting law." *Armijo,* 159 F.3d at 1260. In other words, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* (quoting *Clanton,* 129 F.3d at 1154) (internal quotation marks omitted). A plaintiff may meet his or her burden by pointing to "a Supreme Court or Tenth Circuit opinion on point, or [by showing] that his or her proposition is supported by the weight of authority from other courts. However, we do not require plaintiffs to produce a factually identical case, but allow some degree of generality in factual correspondence." *Id.* (citation omitted).

A. Fourth Amendment Claim

The Agents urge us to reverse the district court's order denying them immunity from Mr. Howards' Fourth Amendment retaliatory arrest claim. They argue that even under Mr. Howards' version of the facts, they possessed probable cause to believe he had violated 18 U.S.C. § 1001 by lying to them. Section 1001 prohibits the knowing and willful making of "any materially false, fictitious, or fraudulent statement or representation." A violation of § 1001 occurs where "(1) the defendant made a statement; (2) that was false and the defendant knew it was false; (3) the statement was made knowingly and willfully; (4) the statement was made within the jurisdiction of a federal department or agency; and (5) the statement was material." *United States v. Finn,* 375 F.3d 1033,

1037 (10th Cir.2004) (citing *United States v. Kingston*, 971 F.2d 481, 486 (10th Cir.1992)).

"When a warrantless arrest is the subject of a § 1983 action, the arresting officer is entitled to qualified immunity if a reasonable officer could have believed that probable cause existed to make the arrest." *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1191 (10th Cir.2007). Whether the Agents had probable cause to arrest Mr. Howard is a legal question we review de novo, asking whether the "facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir.1995) (quoting *Jones v. City & Cnty. of Denver*, 854 F.2d 1206, 1210 (10th Cir.1988)) (internal quotation marks omitted). "Our determination on this score is an independent and objective one. Thus an officer's own subjective reason for the arrest is irrelevant, and it does not matter whether the arrestee was later charged with a crime." *Fogarty v. Gallegos*, 523 F.3d 1147, 1156 (10th Cir.2008).

Reviewing the facts through Mr. Howards' lens, there was probable cause to arrest him for a suspected violation of § 1001.[7] The Agents testified, and

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[7] In district court, the Agents proffered additional offenses for which they claimed probable cause to arrest Mr. Howards.

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Mr. Howards does not dispute, that Agent Reichle was directed to interview a protective intelligence subject, Mr. Howards. Agent Reichle received information from three different Secret Service Agents that Mr. Howards had made unsolicited physical contact with the Vice President. During the course of Agent Reichle's investigation into the nature and circumstances of that physical contact, he attempted to interview Mr. Howards, who was not cooperative. As Mr. Howards conceded in his deposition, he made factually inaccurate statements during his exchange with Agent Reichle. Specifically:

> A. At some point . . . [Agent Reichle] also asked me if I touched the Vice President.
>
> Q. How did you respond to that?
>
> A. I believe I said I hadn't.
>
> Q. Okay. And that wasn't truthful, was it?
>
> A. That wasn't accurate.

Aplt. App. at 495. Given this progression of events, there is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001.

Mr. Howards attempts to impeach his own deposition by arguing his "own testimony . . . indisputably

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Because we hold the Agents had probable cause to arrest Mr. Howards for violating 18 U.S.C. § 1001, we need not consider whether probable cause existed for any other offenses.

casts doubt on whether Mr. Howards even made the [false] statement." Aple. Br. at 28. No part of the record supports this reading of his testimony, however. During the deposition, Mr. Howards explained this conversation with Agent Reichle further:

> Q. You testified earlier that you denied putting your hands on Mr. Cheney at some point when Agent Reichle made inquiry of you, and you indicated that was inaccurate. Why did you deny to Agent Reichle that you had put your hands on the Vice President?
>
> A. Because it was so nonchalant and unconscious that it just didn't register at the time.

Aplt. App. at 498. Later in the deposition, Mr. Howards described the conversation again: "He asked me first . . . Did you assault the Vice President? That's the question I remember. . . . At which point I said, No. And then he asked me another question, which may have been, Did you touch the Vice President?" *Id.* at 499-500. If Mr. Howards had misspoken, he had ample opportunity to explain this during the deposition. He did not.

Mr. Howards tries to bolster his Fourth Amendment claim by suggesting that the 18 U.S.C. § 1001 violation was an "after-the-fact justification." This argument is misguided. Under the Fourth Amendment, the "constitutionality of an arrest does not depend on the arresting officer's state of mind." *Apodaca v. City of Albuquerque,* 443 F.3d 1286, 1289

(10th Cir.2006). The "'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.' An arrest is not invalid under the Fourth Amendment simply because the police officer subjectively intended to base the arrest on an offense for which probable cause is lacking, so long as 'the circumstances, viewed objectively, justify' the arrest." *Id.* (citations omitted) (quoting *Devenpeck v. Alford,* 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004)); *cf. United States v. Santana-Garcia,* 264 F.3d 1188, 1192 (10th Cir.2001) ("That an officer did not believe probable cause existed to detain a suspect does not preclude the Government from justifying the suspect's detention by establishing probable cause.").

The constitutionality of Mr. Howards' arrest is not undermined simply because the justification used to support the lawfulness of the arrest was not in the Agents' mind at the time the arrest was made. Despite Mr. Howards' contention, probable cause in this case is not established by an after-acquired fact. At the time of the arrest, Mr. Howards had already claimed, falsely, that he did not touch the Vice President. The facts, as they were known to the Agents at the time, objectively justified the arrest under § 1001. This remains true despite the fact that, at the time of the arrest, Agent Reichle intended to base the arrest on other charges.

"[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of public and private interests is not in

doubt. The arrest is constitutionally reasonable." *Virginia v. Moore,* 553 U.S. 164, 171, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008); *see also Atwater v. Lago Vista,* 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Similarly, because the arrest was supported by probable cause, the search of Mr. Howards incidental to the arrest was also lawful. *See, e.g., Beck v. Ohio,* 379 U.S. 89, 90, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964) ("There are limits to the permissible scope of a warrantless search incident to a lawful arrest, but . . . if the arrest itself was lawful, those limits were not exceeded here."); *United States v. Anchondo,* 156 F.3d 1043, 1045 (10th Cir.1998) ("[O]fficers may conduct a warrantless search of a person when it is incident to a lawful arrest of that person.").

Because the arrest and search were not in violation of the Fourth Amendment, Mr. Howards is unable to satisfy the first prong of our qualified immunity analysis. *See Pearson,* 129 S.Ct. at 815-16; *Swanson,* 577 F.3d at 1199. The presence of probable cause for Mr. Howards' arrest entitles the Agents to qualified immunity from the Fourth Amendment claims against them. Accordingly, we reverse the district court's denial of the Agents' assertions of qualified immunity on this claim.

B. First Amendment Claim

Even if an official's action would be "unexceptionable if taken on other grounds," when retaliation against Constitutionally-protected speech is the but-for cause of that action, this retaliation is actionable and "subject to recovery." *Hartman v. Moore,* 547 U.S. 250, 256, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006) (citing *Crawford-El v. Britton,* 523 U.S. 574, 593, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 283-84, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977)); *see also DeLoach v. Bevers,* 922 F.2d 618, 620 (10th Cir.1990) ("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." (internal quotation marks omitted)); *cf. Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (explaining that although the constitutionality of a seizure under the Fourth Amendment does not depend on the motivations of the officers involved, "selective enforcement of the law based on considerations such as race" violates the Equal Protection Clause). "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'" *Hartman,* 547 U.S. at 256, 126 S.Ct. 1695 (quoting *Crawford-El,* 523 U.S. at 588 n. 10, 118 S.Ct. 1584) (alteration in original). Moreover, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal

prosecutions, for speaking out." *Id.*; *see also Perry v. Sindermann,* 408 U.S. 593, 597, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (noting government may not punish a person or deprive him of a benefit due to his "constitutionally protected speech").

"To establish a First Amendment retaliation claim, a plaintiff must show that (1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct." *Nielander v. Bd. of Cnty. Comm'rs,* 582 F.3d 1155, 1165 (10th Cir.2009) (citing *Worrell v. Henry,* 219 F.3d 1197, 1212 (10th Cir.2000)). The district court denied qualified immunity from Mr. Howards' First Amendment claim on the basis that "numerous issue [sic] of material fact exist that must be determined by a jury." Dist. Ct. Order at 76, Aplt. App. at 716 (hereinafter "Order").

The district court expressed its belief that its decision was "based on the facts," and thus "there is [no] basis for an interlocutory appeal." *Id.* at 77. However, it did not "identify the particular charged conduct that it deemed adequately supported by the evidence." *See Armijo,* 159 F.3d at 1259 (quoting *Behrens v. Pelletier,* 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996)) (internal quotation marks omitted). Given the different roles of each agent in Mr. Howards' arrest, we will first address the arguments of Agents Reichle and Doyle as to why they are

entitled to qualified immunity on the First Amendment claim, and then turn to those of Agents Daniels and McLaughlin.

1. Agents Reichle and Doyle

We agree with the district court that Mr. Howards has presented evidence sufficient to deprive Agents Reichle and Doyle of qualified immunity on the First Amendment claim at this stage. Although we reach this conclusion using a different analytical path than the district court, "we may affirm on any grounds that are sufficiently supported by the record to allow for a conclusion as a matter of law." *Nielander*, 582 F.3d at 1166.

a. Mr. Howards has sufficiently articulated a First Amendment violation.

Mr. Howards argues, and Agents Reichle and Doyle do not contest, that Mr. Howards has satisfied the three elements of a First Amendment violation articulated in *Nielander*. Indeed, because their briefs on this issue focus solely on their probable cause argument which we discuss below, they do not address the *Nielander* factors at all.

Viewing the record in the light most favorable to Mr. Howards, we agree that he has satisfied the elements of a First Amendment retaliation claim. First, his speech leading up to his arrest fell within

the "broad command" of the First Amendment.[8] *See, e.g., Spence v. Washington*, 418 U.S. 405, 410, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (recognizing that "pointed expression[s] of anguish . . . about the then-current domestic and foreign affairs of [the] government" are protected by the First Amendment). Second, there can be no question that an arrest in retaliation for the exercise of protected speech constitutes an injury cognizable under our First Amendment jurisprudence. *See Worrell*, 219 F.3d at 1212 ("[A]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." (internal quotation marks omitted)).

Third, Mr. Howards has provided facts which suggest Agents Doyle and Reichle may have been substantially motivated by Mr. Howards' speech when he was arrested. Agent Doyle overheard Mr. Howards say into his cell phone, "I'm going to ask him how many kids he's killed today." Aplt. App. at 532. He

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[8] Although Mr. Howards' brief focuses on his statement that he was "going to ask [the Vice President] how many kids he's killed today," *see* Aple. Br. at 45-46, he makes passing reference to other statements that conceivably motivated his arrest. Specifically, Mr. Howards declined Agent Reichle's initial invitation to speak out about his encounter with the Vice President. *Id.* at 7. Thereafter, he did explain the encounter with the Vice President and informed Agent Reichle that if "you [Agent Reichle] don't want other people sharing their opinions, you should have him avoid public places." *Id.*

admitted the comment "disturbed" him. *Id.* He believed it was not "healthy" and was "[not] quite right" for someone to make such a comment to the Vice President. *Id.* Similarly, Agent Reichle was told by Agent Doyle about Mr. Howards' cell phone conversation. *Id.* at 371. Mr. Howards testified that when he told Agent Reichle "about the way [he] felt about the war in Iraq, Mr. Reichle became visibly angry. . . ." *Id.* at 500. Agent Reichle also admitted he considered this cell phone conversation when deciding to arrest Mr. Howards. *Id.* at 280. Agents Doyle and Reichle do not dispute the district court's determination that "there is a question of fact on this element [of retaliation]. . . . [because] there are conflicting accounts regarding which defendant knew what about plaintiff's cell phone conversation, when defendants knew it, and whether the conversation should be used to support probable cause." Order at 75.

b. The presence of probable cause is not fatal to Mr. Howards' First Amendment retaliation claim.

Instead, Agents Reichle and Doyle rely on the Supreme Court's decision in *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), to contend they are entitled to qualified immunity on the First Amendment claim because "in a case such as this, an absence of probable cause for the arrest 'must be pleaded and proven' as an element of the plaintiff's case." Reichle/Doyle Br. at 14. They assert that "[i]f an officer had probable cause to arrest a

plaintiff for *any* crime, it is irrelevant that a plaintiff may have engaged in protected speech prior to or during the arrest." *Id.* at 15 (citing *Redd v. City of Enterprise,* 140 F.3d at 1379 (11th Cir.1998) (citing *Zurcher v. Stanford Daily,* 436 U.S. 547, 565, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978))); *cf. Hartman,* 547 U.S. at 259-60, 126 S.Ct. 1695 (holding that to prevail on a *retaliatory prosecution* claim, a plaintiff must plead and prove the absence of probable cause).[9] The Agents' reliance on *Hartman* is misplaced.[10]

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[9] In a footnote in their reply brief on appeal, Agents Reichle and Doyle contend Mr. Howards waived any response to this argument by failing to address it in the district court. *See* Reichle/Doyle Reply Br. at 10 n.3. But they themselves did not raise *Hartman* there until their reply brief. Their delay in raising *Hartman* was "manifestly unfair" to Mr. Howards "who, under [court] rules, ha[d] no opportunity for a written response" and, moreover, worked an unfairness to the district court itself, which did not have the benefit of a written response from Mr. Howards in regard to the Agents' "late-blooming argument". *See Hill v. Kemp,* 478 F.3d 1236, 1251 (10th Cir.2007) (quoting *Headrick v. Rockwell Int'l Corp.,* 24 F.3d 1272, 1278 (10th Cir.1994)) (internal quotation marks and ellipses omitted). Therefore, we address the applicability of *Hartman* as presented to us by both parties on appeal.

[10] The Agents' citations to *Zurcher v. Stanford Daily,* 436 U.S. 547, 565, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978), for the proposition that "complying with the Fourth Amendment for an arrest can overcome any issues that arise with the First Amendment," *see* Reichle/Doyle Br. at 14, similarly miss the mark. *Zurcher* involved a search pursuant to a *warrant.* "The Fourth Amendment demonstrates a strong preference for searches conducted pursuant to a warrant, and the police are more likely to use the warrant process if the scrutiny applied to a magistrate's probable-cause determination to issue a warrant is less

(Continued on following page)

Prior to *Hartman,* a plaintiff bringing a First Amendment retaliation claim in this circuit was not required to show that the defendants lacked probable cause for their actions. *See, e.g., DeLoach v. Bevers,* 922 F.2d 618, 620 (10th Cir.1990) (retaliatory arrest); *Poole v. Cnty. of Otero,* 271 F.3d 955 (10th Cir.2001) (retaliatory prosecution), *abrogated by Hartman,* 547 U.S. 250, 126 S.Ct. 1695. We recognized in the context of an arrest that "[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." *DeLoach,* 922 F.2d at 620 (internal quotation marks omitted); *see also Gehl Group v. Koby,* 63 F.3d 1528, 1534 (10th Cir.1995) ("[G]overnment actors cannot intentionally suppress constitutionally protected expression because of its content and avoid First Amendment scrutiny simply by claiming that they were acting pursuant to an otherwise valid criminal law."), *abrogated on other grounds by Crawford-El v. Britton,* 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

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than that for warrantless searches." *Ornelas v. United States,* 517 U.S. 690, 699, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (citation and internal quotation marks omitted). As such, searches and seizures pursuant to a warrant are given deference by reviewing courts, whereas we review the constitutionality of *warrantless* searches and seizures de novo. *Id.* at 698-99, 116 S.Ct. 1657. Given the substantive differences between the search of a newsroom pursuant to a warrant at issue in *Zurcher* and the warrantless arrest in a public space at issue here, we find *Zurcher* inapposite.

This approach is consistent with the Supreme Court's general approach to retaliation claims under *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), which requires a plaintiff to show that the defendant's conduct was substantially motivated by the plaintiff's exercise of his or her First Amendment rights, but then shifts the burden to the defendant to prove that the same decision would have been reached "even in the absence of the protected conduct." *Id.* at 287, 97 S.Ct. 568. Nonetheless, other circuits were split on their approaches prior to *Hartman.* Some circuits, like ours, permitted plaintiffs to successfully bring retaliatory arrest and prosecution claims, despite the presence of probable cause for the arrest. *See, e.g., Greene v. Barber,* 310 F.3d 889, 895 (6th Cir.2002); *Haynesworth v. Miller,* 820 F.2d 1245, 1256-57 (D.C.Cir.1987). Other circuits required plaintiffs to show an absence of probable cause. *See, e.g., Keenan v. Tejeda,* 290 F.3d 252, 261-62 (5th Cir.2002); *Smithson v. Aldrich,* 235 F.3d 1058, 1063 (8th Cir.2000); *Merkle v. Upper Dublin Sch. Dist.,* 211 F.3d 782, 794-96 (3d Cir.2000); *Redd v. City of Enterprise,* 140 F.3d 1378, 1383 (11th Cir.1998); *Singer v. Fulton Cnty. Sheriff,* 63 F.3d 110, 120 (2d Cir.1995).

Hartman resolved the split with regard to retaliatory prosecution cases. There, the Court addressed a plaintiff's claim for malicious prosecution based on an allegation that Postal Service inspectors and a prosecutor "engineered his criminal prosecution in

retaliation for [his] criticism of the Postal Service," in violation of his First Amendment rights. *Hartman*, 547 U.S. at 254, 126 S.Ct. 1695.[11] In holding that the absence of probable cause is a necessary element of a retaliatory prosecution case, the Court was careful to distinguish between the "complex" causation relationship inherent in a retaliatory prosecution versus that of "ordinary retaliation claims, where the government agent allegedly harboring the animus is also the individual allegedly taking the adverse action." *Id.* at 259, 126 S.Ct. 1695.

The Court explained:

> When the claimed retaliation for protected conduct is a criminal charge, however, a constitutional tort action will differ from this standard case in two ways. . . . What is different about a prosecution case, . . . is that there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge. . . . The second respect in which a retaliatory-prosecution case is different also goes to . . . causation . . . ; the difference is that the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more

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[11] The district court dismissed the claim against the prosecutor based on absolute prosecutorial immunity. *Hartman*, 547 U.S. at 254-55, 126 S.Ct. 1695.

> complex than it is in other retaliation cases, and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven.

Id. at 260-61, 126 S.Ct. 1695. The complexity inheres because the "the causal connection required is not merely between the retaliatory animus of one person [there, the postal inspector] and that person's own injurious action, but between the retaliatory animus of one person and the action of another [the prosecutor]." *Id.* at 262, 126 S.Ct. 1695. Indeed, as the Court made clear, "[i]t is . . . the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, that provides the strongest justification for the no-probable-cause requirement espoused by the inspectors." *Id.* at 259, 126 S.Ct. 1695.

Before concluding, the Court noted one additional difference in the retaliatory prosecution context: the "added legal obstacle in the longstanding presumption of regularity accorded to prosecutorial decisionmaking." *Id.* at 263, 126 S.Ct. 1695. "[T]his presumption that a prosecutor has legitimate grounds for the action he takes is one we do not lightly discard. . . ." *Id.*

In the wake of *Hartman,* our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests, that is, whether a plaintiff in that retaliation context must show that the defendants lacked probable cause for the arrest. *See Skoog v.*

Cnty. of Clackamas, 469 F.3d 1221, 1231 & n. 31 (9th Cir.2006) (recognizing split among circuits). *Compare McCabe v. Parker,* 608 F.3d 1068, 1075 (8th Cir.2010), *Phillips v. Irvin,* 222 Fed.Appx. 928, 929 (11th Cir.2007), *and Barnes v. Wright,* 449 F.3d 709, 720 (6th Cir.2006) (requiring plaintiffs to show lack of probable cause for arrest), *with Skoog,* 469 F.3d at 1231 (allowing plaintiffs to bring First Amendment retaliation claims even when probable cause existed for arrest).[12]

We decline to extend *Hartman*'s "no-probable-cause" requirement to this retaliatory arrest case. Unlike the plaintiff in *Hartman,* Mr. Howards does not attack prosecutorial discretion based on the bad motive of a third person. Instead, he contends Agents Reichle and Doyle arrested him with their own retaliatory motives, because of the exercise of his First Amendment rights. Such is the quintessential "ordinary retaliation claim" as outlined in *Hartman* – a claim in which the agent allegedly harboring the

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[12] Although *Skoog* held that in an "ordinary" retaliation case, the plaintiff need not plead the absence of probable cause in order to state a claim, it also determined that the constitutional violation was not clearly established when Mr. Skoog's arrest occurred. 469 F.3d at 1235. *Skoog* explained that even prior to *Hartman* it was "an open question" in the Ninth Circuit whether "a plaintiff must plead the absence of probable cause in order to . . . state a claim for retaliation. . . ." *Id.* at 1232; *see also id.* at 1232 n. 30. Unlike the Ninth Circuit, our circuit has prior binding precedent that a plaintiff need not plead the absence of probable cause to bring a retaliatory arrest claim. *See DeLoach,* 922 F.2d at 620.

unconstitutional animus is the same individual who carries out the adverse action. *Hartman,* 547 U.S. at 259-60, 126 S.Ct. 1695. And unlike prosecutors, Secret Service Agents enjoy no presumption of regularity regarding their decisionmaking. As a result, this factor counts against extending *Hartman* to the circumstances here.

In light of the care the Supreme Court took to distinguish between complex and ordinary retaliation claims, we are not persuaded *Hartman* applies to the circumstances here.[13] *See* John Koerner, Note, *Between* Healthy *and* Hartman: *Probable Cause in Retaliatory Arrest Cases,* 109 Colum. L. Rev. 755, 771 (2009) ("[T]he Court did not signal that it was rejecting [the *Mt. Healthy*] standard in general. Instead, the Court stressed three factors that supported a heightened pleading standard in retaliatory prosecution cases: complex causation, evidentiary concerns, and the presumption of prosecutorial regularity."). The alternative approach, extending the "no-probable-cause" requirement to this ordinary retaliatory arrest

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[13] We have applied *Hartman* in another context, but that was a situation involving complex causation, not an ordinary retaliation claim like the one in this case. In *McBeth v. Himes,* 598 F.3d 708, 719 (10th Cir.2010), we applied *Hartman* to require proof of the absence of probable cause in a claim alleging that defendants induced the Department of Human Services to suspend plaintiff's daycare license. This application of *Hartman* was justified because that claim "present[ed] the same difficulties in tracing the chain of causation as *Hartman* did." *Id.* We expressly "[did] not hold that the *Hartman* rule is applicable to 'ordinary' retaliation claims." *Id.* at 720.

case and dismissing Mr. Howards' suit, would result in the Court's limited exception devouring the rule. Because we hold *Hartman* did not disturb our earlier precedent on ordinary retaliation cases, when Mr. Howards was arrested it was clearly established that an arrest made in retaliation of an individual's First Amendment rights is unlawful, even if the arrest is supported by probable cause.[14] Accordingly, our prior precedent permits Mr. Howards to proceed with his

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[14] Notably, no party asserts on appeal that the law on retaliatory arrests was not "clearly established" in this circuit either before or after *Hartman*. Nevertheless, the dissenting opinion points to the split among the circuits to argue the law on retaliatory arrests was not "clearly established" after *Hartman*. In qualified immunity cases, we may look to other courts when there is no Supreme Court or Tenth Circuit precedent on point to determine if a right is "clearly established." *See, e.g., York v. City of Las Cruces*, 523 F.3d 1205, 1211-12 (10th Cir.2008). Although a conflict among the circuits "is relevant" to our determination of whether a right is clearly established, it is "not controlling." *Garcia by Garcia v. Miera*, 817 F.2d 650, 658 (10th Cir.1987). "[T]he fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear." *Safford Unified Sch. Dist. No. 1 v. Redding*, ___ U.S. ___, 129 S.Ct. 2633, 2644, 174 L.Ed.2d 354 (2009). Prior to *Hartman*, the law on retaliatory arrests was clear in the Tenth Circuit. *See DeLoach*, 922 F.2d at 620; *see also Greene v. Barber*, 310 F.3d 889, 895 (6th Cir.2002) (relying on *DeLoach* and explaining "the existence of probable cause is not determinative of the constitutional question if . . . the plaintiff was arrested in retaliation for his having engaged in constitutionally protected speech"). *Hartman* did nothing to disturb this law. The fact that some of our sister circuits disagree with us on this issue does not bind us, nor does it force us to find the law was no longer clearly established in this circuit. *See Garcia*, 817 F.2d at 658.

First Amendment retaliation claim notwithstanding probable cause existed for his arrest.[15] *See DeLoach*, 922 F.2d at 620.

Based on the record here, and in the absence of any argument from Agents Reichle and Doyle that Mr. Howards failed to present evidence to establish a First Amendment violation, *see Nielander v. Bd. of Cnty. Comm'rs*, 582 F.3d 1155, 1165 (10th Cir.2009), we conclude the district court correctly denied these

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[15] It is well established that an act which is lawful under the Fourth Amendment may still violate other provisions of the Constitution. For example, in *Whren v. United States*, 517 U.S. 806, 809, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), the Court considered whether a traffic stop that was supported by probable cause could violate the Fourth Amendment when the reason for the stop was pretextual. The two black male defendants were arrested for possessing illegal drugs after their car was stopped by vice officers in a "high drug area." *Id.* at 808, 116 S.Ct. 1769. The defendants conceded the police had probable cause to believe that they had violated local traffic laws, but argued the traffic stop nonetheless should be held unreasonable under the Fourth Amendment, because the stop was pretextual and no reasonable officer would have stopped them for those traffic violations. *Id.* at 810, 116 S.Ct. 1769. The Court held "[s]ubjective intentions [of police] play no role in ordinary, probable-cause Fourth Amendment analysis," therefore the traffic stop did not violate the Fourth Amendment. The Court nevertheless pointed out that "the Constitution prohibits selective enforcement of the law based on considerations such as race." *Id.* at 813, 116 S.Ct. 1769. As a result, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.* A reasonable search and seizure is thus not inoculated against all constitutional scrutiny. Significantly, *Hartman* did not overrule *Whren*, nor did it undermine this important principle.

Agents' motion for qualified immunity on Mr. Howards' First Amendment claim for retaliatory arrest.

2. Agents Daniels and McLaughlin

Significantly, Mr. Howards has not identified anything in the record that might support a retaliatory motive on the part of Agents Daniels or McLaughlin. To survive summary judgment, Mr. Howards must show that defendants violated his constitutional rights. Given the nature of his First Amendment retaliation claim, he must offer evidence indicating a retaliatory motive on the part of these defendants in response to the exercise of his First Amendment rights. *See Nielander,* 582 F.3d at 1165.

Mr. Howards has neither offered evidence nor articulated facts showing that Agents Daniels or McLaughlin's conduct was in any way influenced by a retaliatory motive. Mr. Howards argues that because both Agents "Daniels and McLaughlin included [the cell phone] statement in their incident reports" but excluded other facts, there is "circumstantial evidence that Agents Daniels and McLaughlin were not motivated to arrest Mr. Howards because of his conduct, but were, in fact, motivated to arrest him because of the content of his speech." Aple. Br. at 47. In the context of this case, this evidence alone is inadequate to satisfy the third element of a First Amendment claim.

Mr. Howards has provided no evidence that Agents Daniels and McLaughlin did anything but

follow the directions of fellow Secret Service Agents. They began monitoring Mr. Howards' movements when asked to by Agent Doyle. Agent McLaughlin indicated he believed it was "within [Mr. Howards'] bounds" to make a critical statement to the Vice President. Aplt. App. at 425. Although Agent Doyle told them about Mr. Howards' cell phone call, Agents Daniels and McLaughlin were unaware of what Mr. Howards actually said to the Vice President. Similarly, Mr. Howards offered no evidence that either Agent Daniels or Agent McLaughlin participated in the decision to arrest him. They had no contact with Mr. Howards until after Agent Reichle ordered the arrest. There is no suggestion in the record that Agents Daniels and McLaughlin did anything but assist their fellow agents. Without such evidence, Mr. Howards has not shown that Agents Daniels and McLaughlin violated his constitutional rights, as required in qualified immunity cases. *See, e.g., Pearson,* 129 S.Ct. at 815-16; *Swanson,* 577 F.3d at 1199.

Significantly, Agents Daniels and McLaughlin were entitled to rely on Agent Reichle's determination that there was probable cause to arrest Mr. Howards. Just as with police work, a Secret Service Agent's role requires reliance "on the observations, statements, and conclusions" of fellow agents. *See Baptiste v. J.C. Penney Co.,* 147 F.3d 1252, 1260 (10th Cir.1998). "When one officer requests that another officer assist in executing an arrest, the assisting officer is not required to second-guess the requesting officer's

probable cause determination, nor is he required to independently determine that probable cause exists." *Stearns v. Clarkson,* 615 F.3d 1278, 1286 (10th Cir.2010). "Police officers are entitled to rely upon information relayed to them by other officers in determining whether there is reasonable suspicion to justify an investigative detention or probable cause to arrest." *Oliver v. Woods,* 209 F.3d 1179, 1190 (10th Cir.2000). "[A] police officer who acts in reliance on what proves to be the flawed conclusions of a fellow police officer may nonetheless be entitled to qualified immunity as long as the officer's reliance was objectively reasonable." *Baptiste,* 147 F.3d at 1260 (internal quotation marks omitted). As a result, absent evidence that Agents Daniels and McLaughlin were motivated to arrest Mr. Howards because of his speech, they are entitled to qualified immunity for assisting in the arrest, so long as their reliance on Agent Reichle was objectively reasonable.

Under the circumstances, it was objectively reasonable for Agents Daniels and McLaughlin to rely on Agent Reichle's probable cause determination. The two agents knew they had access to incomplete information regarding Mr. Howards' conduct. Because they were operating in undercover counter-surveillance roles, they did not carry radios and therefore did not have any information about Mr. Howards that might have been transmitted by radio. Agent Reichle, on the other hand, carried a radio and had interviewed Mr. Howards.

Although Mr. Howards emphasizes that Agents Daniels and McLaughlin both believed, based on what they had seen, there was not probable cause to arrest Mr. Howard for his touch of the Vice President, this is not dispositive. Agents Daniels and McLaughlin's personal knowledge is irrelevant unless it in some way suggests that their reliance on Agent Reichle's probable cause determination was unreasonable. *See Stearns*, 615 F.3d at 1286. Given the compartmentalized roles of the agents, and the potential information to which Agents Daniels and McLaughlin lacked access, their own observations did not undermine the objective reasonableness of their reliance on Agent Reichle. Accordingly, the district court erred in denying Agents Daniels and McLaughlin's motion for qualified immunity and for judgment as a matter of law on Mr. Howards' First Amendment claim.

IV.

For the foregoing reasons, we **REVERSE** the district court's denial of qualified immunity to all defendants on Mr. Howards' Fourth Amendment claim; we **REVERSE** the district court's denial of qualified immunity to Agents Daniels and McLaughlin on Mr. Howards' First Amendment claim; and we **AFFIRM** the district court's denial of qualified immunity to Agents Reichle and Doyle on Mr. Howards' First Amendment claim and **REMAND** for further proceedings consistent with this opinion.

KELLY, Circuit Judge, concurring in part and dissenting in part.

In my view, all of the agents should receive qualified immunity. Thus, I concur insofar as Agents Daniels and McLaughlin receive it, and dissent as to the denial of qualified immunity to Agents Reichle and Doyle.

The Fourth Amendment issue in this case is plainly controlled by *Devenpeck v. Alford*, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004), holding that as long as an officer is aware of facts suggesting probable cause, the offense that furnishes the basis for probable cause need not be related to what is charged. In the qualified immunity context, all that is required is arguable probable cause, and in this case agents had arguable probable cause to believe that Mr. Howards made a false statement. *See Cortez v. McCauley*, 478 F.3d 1108, 1121 (10th Cir.2007) (en banc) (arguable probable cause).

There is a strong argument that *Hartman v. Moore*, 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), applies not only to retaliatory prosecutions, but also to retaliatory arrests. The prosecutor will generally receive absolute immunity for decisions to prosecute, while the agents and investigators will claim qualified immunity for steps leading to prosecution (investigation and arrest) and prosecution. Probable cause evidence will be readily available and relevant in most retaliatory arrest cases; the fact that causation may not be as complex should not preclude

consideration of this as an element. Several cases hold or imply that *Hartman* applies to arrest as well as prosecution. *See McCabe v. Parker,* 608 F.3d 1068, 1079 (8th Cir.2010); *Beck v. City of Upland,* 527 F.3d 853, 863-64 (9th Cir.2008) (suggesting that *Hartman* applies to a retaliatory arrest or prosecution claim); *Leonard v. Robinson,* 477 F.3d 347, 355-56 (6th Cir.2007); *Barnes v. Wright,* 449 F.3d 709, 720 (6th Cir.2006). The court adopts a minority view based upon the rationale of *Skoog v. County of Clackamas,* 469 F.3d 1221, 1233-35 (9th Cir.2006).

Given a qualified immunity defense, Plaintiff had the burden to prove not only a constitutional violation but also clearly established law. *Pearson v. Callahan,* 555 U.S. 223, 129 S.Ct. 808, 815-816, 172 L.Ed.2d 565 (2009). In *DeLoach v. Bevers,* 922 F.2d 618, 620 (10th Cir.1990), this court held that a claim for retaliatory arrest and prosecution (leading to a suspect being bound over for trial), was actionable, even if another reason would have supported the action.

On June 16, 2006, when the arrest in this case occurred, the law simply was not clearly established (nor is it now) that *Hartman* only applied to retaliatory prosecutions and not retaliatory arrests. The Tenth Circuit has been willing to apply *Hartman* in other contexts, albeit where there are multiple decisionmakers. *McBeth v. Himes,* 598 F.3d 708, 718-20 (10th Cir.2010). Given that the officers are deemed to have probable cause, no objectively reasonable officer on June 16, 2006 would be on notice that probable cause was insufficient to overcome claims of

First Amendment retaliation. There are two reasons for this. First, *DeLoach* is a retaliatory arrest and prosecution (not solely a retaliatory arrest) case – the significance of this may not have been apparent earlier, but it certainly is after *Hartman*. Second, in *Hartman* the Supreme Court rejected the Tenth Circuit's approach to retaliatory prosecution cases, 547 U.S. at 256, 126 S.Ct. 1695, and the court today acknowledges that "our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests." Ct. Op. at 1147.

If anything, the weight of *DeLoach* when applied solely to a retaliatory arrest case was far from clear after *Hartman*. The court reminds us that a conflict among the circuits is merely relevant to whether a right is clearly established, not controlling, and also relies upon the Supreme Court's statement that "the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if **we** have been clear." *Safford Unified Sch. Dist. No. 1 v. Redding*, ___ U.S. ___, 129 S.Ct. 2633, 2644, 174 L.Ed.2d 354 (2009) (emphasis added). Of course, the "we" pertains to the Supreme Court. This court's conclusion after *Hartman* – that *Hartman* did nothing to disturb this circuit's law on retaliatory arrests – is by no means a preordained conclusion as evidenced by this court's acknowledgment that courts are split about whether it applies to retaliatory arrests, and the analysis rejecting *Hartman* in this context. The law the court announces was hardly apparent and would not put

officials on fair notice that such conduct was unlawful. *See Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). This is particularly true given how solicitous the court has been when it comes to protecting the Vice President. *See Saucier v. Katz,* 533 U.S. 194, 208-09, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN HOWARDS,

Plaintiff-Appellee,

v.

DANIEL McLAUGHLIN, in his individual and official capacity, et al.,

Defendants-Appellants,

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity, et al.,

Defendants.

No. 09-1201

UNITED STATES OF AMERICA,

Amicus Curiae.

STEVEN HOWARDS,

Plaintiff-Appellee,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity, et al.,

Defendants-Appellants,

No. 09-1202

DANIEL McLAUGHLIN,
in his individual and official capacity, et al.,

Defendants,

UNITED STATES OF AMERICA,

Amicus Cuiae [sic].

ORDER

(Filed May 4, 2011)

Before **KELLY**, **SEYMOUR**, and **LUCERO**, Circuit Judges.

This matter is before the court on "Appellants Reichle and Doyle's Motion to Stay Issuance of the Mandate. The motion is granted. The issuance of the mandate shall be stayed for 90 days until July 19, 2011.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-1964-CMA

STEVEN HOWARDS,

Plaintiff,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity; DANIEL MCLAUGHLIN, in his individual and official capacity; DAN DOYLE, in his individual and official capacity; and ADAM DANIELS, in his individual and official capacity,

Defendants.

REPORTER'S TRANSCRIPT
(Motions Hearing)

Proceedings before the HONORABLE CHRISTINE M. ARGUELLO, Judge, United States District Court, for the District of Colorado, commencing at 8:59 a.m. on the 14th day of April, 2009, Alfred A. Arraj United States Courthouse, Denver, Colorado.

APPEARANCES

FOR THE PLAINTIFF:
DAVID LANE and ALTHEA LICHT, Killmer, Lane & Newman, LLP, 1543 Champa Street, Suite 400, Denver, CO 80202

FOR DEFENDANTS REICHLE and DOYLE:
SEAN R. GALLAGHER and DUGAN W.E. BLISS, Hogan & Hartson, LLP-Denver, 1200 17th St., Suite 1500, Denver, CO 80202

FOR DEFENDANTS MCLAUGHLIN and DANIELS:
RICHARD A. WESTFALL and AARON L. SOLOMON, Hale Friesen, LLP, 1660 Wynkoop St., Suite 900, Denver, CO 80202

* * *

[65] cause existed to arrest Mr. Howards under 18 U.S.C. 1001, this Court should grant summary judgment because the plaintiff has failed to present evidence that but for the protected statement, Mr. Howards would not have been arrested, we are entitled to summary judgment.

And, finally, because the Secret Service Agents are entitled to not just the qualified immunity but an absolute immunity, as laid out in the *Galella* case and later cases. We suggest the Court should enter summary judgment on behalf of the defense.

If there are no further questions, I thank the Court.

THE COURT: Thank you. The Court is going to take a 10-minute recess, and then will be back with its ruling. Court is in recess.

(A break is taken from 10:25 p.m. to 10:37 p.m.)

THE COURT: You may be seated. All right. Before the Court are two separate motions for summary judgment. Defendant Daniels and McLaughlin filed one motion and defendants Reichle and Doyle filed the other.

Daniels and McLaughlin argue, number one, that plaintiff's claims may not be brought under Section 1983 but must be brought under *Bivens v. Six Unknown Named Agents*. And nobody addressed that agent today, but I did read all of the briefing; that they did not personally [66] participate in the arrest giving rise to plaintiff's claims; and that they are entitled to qualified immunity. Agents Reichle and Doyle argue they, too, are entitled to qualified immunity.

The Court has read in detail the briefs filed by the defendants, the responses filed by the plaintiff, and the reply briefs filed by the defendants, and has heard oral argument on the motion this morning. The Court is going to address first the Section 1983 or *Bivens* action, which, as I indicated, neither party did address this in this morning's hearing, but the Court has reviewed the filings.

The Court finds that plaintiff may proceed under Section 1983 and/or *Bivens*. The question then turns on whether the defendants acted under the "color of state law," and this is a legal issue that the Court can decide at this stage in case.

In contrast to Daniels' and McLaughlin's arguments, the nature of their employment is not

dispositive on this topic. The record shows that the defendants worked hand in hand with the Eagle County Sheriff to arrest and detain plaintiff and bring charges against for him for purported violations of state law. Defendants never charged plaintiff with a violation of federal law, although they now argue that they have probable cause to do so. Given [67] these facts, the Court concludes that the defendants were, in fact, acting under the "color of state law" and, therefore, plaintiff may proceed under Section 1983 and/or under *Bivens*.

The Court will now address the substance of the defendants' motions. Under Federal Rule 56, summary judgment is proper only when the moving parties can demonstrate on the basis of the pleadings, discovery and other disclosures that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is "material" if it may affect the outcome of the case. In deciding a motion for summary judgment, the Court must construe the record and draw all reasonable inferences therefrom in a light favorable to the non-moving party; in this case, the plaintiff.

With this standard in mind, the Court concludes that there are simply too many issues of material fact to allow for summary judgment in this case.

First, with respect to defendants Daniels' and McLaughlin's argument that the Court should grant them summary judgment because they did not participate in the warrantless arrest and/or search that

gives rise to plaintiff's First and Fourth Amendment claims, the Court disagrees with that argument.

[68] Regarding the arrest, the factual record indicates that both Daniels and McLaughlin assisted Reichle in physically restraining plaintiff in order to accomplish plaintiff's arrest.

Moreover, although there is some dispute over what was communicated by Daniels and McLaughlin to Reichle, there is no dispute that Reichle contends that Daniels' and McLaughlin's eyewitness accounts of plaintiff's behavior and interactions with the Vice President formed a critical component of Reichle's decision to arrest plaintiff.

Regarding the search of plaintiff's person, although Daniels and McLaughlin may not have physically searched plaintiff, it was their purported observations of plaintiff that helped substantiate the warrantless search. Thus, contrary to their argument, Daniels and McLaughlin did not merely stand by idly while Reichle arrested and searched plaintiff; they played an active and integral role.

Next, the Court turns to the defendants' claims for qualified immunity. When the defendant raises qualified immunity the plaintiff bears the burden to come forward with facts to support the two separate prongs that comprise the qualified immunity analysis. First, the plaintiff must show that the defendants violated his [69] constitutional rights. Second, a plaintiff must show that the right was clearly established at the time of the conduct at issue. That

is under the *Baptiste v. J.C. Penney* case, 147 F.3d 1252.

The Court was intrigued by Mr. Westfall's argument dividing the incident into two distinct episodes, but has decided that that argument cannot prevail under a totality of the circumstances standard and in light of defendant Reichle's assertion on page 13 of the brief that Agents Reichle and Doyle had probable cause to arrest Howards for harassment because they had, "reasonably trustworthy information", and that that information consisted of, quote, Howards' suspicious phone call in which he said he intended to ask the Vice President "how many kids he's killed today."

Two, Howard's quick and erratic shadowing of the Vice President. Three, the fact that Howards is carrying a suspicious bag that could have contained a handgun or a bomb. Four, Howards rapid approach to the Vice President. Howards touching or slapping the Vice President. The fact that Howards did not immediately leave the confined area that the Vice President was in, but instead continued to shadow the Vice President's movements. Howards' angry refusal to talk to Agent Reichle, and Howards attempt to walk back towards the Vice President, and then to resist [70] arrest.

With those allegations in mind, the Court does not believe that it should look at this as two distinct episodes because it was the totality of the circumstances that resulted in Agent Reichle's decision to arrest the plaintiff.

Regarding the first prong of qualified immunity, the parties agree that the question of whether the plaintiff's First and/or Fourth Amendment rights were violated revolves largely around whether defendant had probable cause to arrest plaintiff after he approached Vice President Cheney in Beaver Creek on June 16, 2006.

The Court finds that disputed issues of material fact exist on this issue, and that such issues need to resolved by a jury. The standard for determining whether probable cause exists is objective. It turns on whether the, "Fact and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." And that is from *Fogarty v. Gallegos*, 523 F.3d 1147. The officer must have more than a "mere suspicion" that criminal activity is afoot and his subjective belief regarding probable cause is irrelevant.

In assessing reasonability of probable cause for [71] the arrest, the Court must look at the totality of the circumstances surrounding the arrest. The record in this case reflects numerous disputed material facts that are relevant to the determination of whether probable cause existed to arrest plaintiff for any reason and conduct of a warrantless search.

Moreover, unlike the usual case in disputed facts in which the dispute is between the plaintiff's version and the defendant's version, in this case, much of the

disputed facts are among the defendants' different versions of what actually took place.

Although Agent Reichle told plaintiff that he was under arrest for assaulting the Vice President, several agents have testified that the touching of the Vice President was not threatening and that the interaction they saw did not rise to the level of probable cause for an arrest for assault.

Thus, defendants Reichle and Doyle now assert that probable cause existed to arrest Howards – plaintiff for harassment because they had reasonably trustworthy information. And today there is more detailed argument that they also had probable cause for lying to a federal agent under 18 U.S.C. Section 1001(a), the elements of which are that the plaintiff made a statement; two, that was false and he or she knew was false; three, that the [72] statement was made knowingly and willfully; four, the statements was made regarding a matter within the jurisdiction of the federal executive, legislature or judicial branch; and five, the statement was material.

The Court believes that there are numerous issues of disputed fact with respect to the elements of either the crime of harassment or lying to a federal agent that would preclude summary judgment in this particular case.

In particular, the Court is somewhat concerned about the fact that the plaintiff's suspicious phone call in which he said he intended to ask the Vice President "how many kids he's killed today," that

statement is very troubling to this Court, because there is nothing in the statement that is threatening to the Vice President or to anyone else.

Defendant Doyle testified that he understood this statement to refer to the war in Iraq, and except for the fact that the substantive contents of this statement clearly denotes an opposition to the war in Iraq, it is not readily apparent by the agents that considered this statement to be suspicious. Yet, it was on the basis of the contents of this simple statement that plaintiff was put under surveillance by the Secret Service.

Two, there are numerous conflicts in the testimony regarding plaintiff's movements throughout the mall before [73] he approached the Vice President, as he approached the Vice President, after he touched the Vice President, when he was approached by Reichle after returning to the mall from inside a building, and during his questioning by Agent Reichle.

For example Agent Lee noticed nothing unusual about plaintiff's movement before he contacted the Vice President, but defendant Doyle contends that plaintiff's movements were erratic and abrupt. There are conflicts regarding plaintiff's whereabouts immediately after he touched the Vice President's shoulder.

Defendants contends that plaintiff remained in close proximity to the Vice President and shadowed the Vice President's movements, but plaintiff contends that he left the mall, entered a building to get

his son, and returned to the mall, whereupon defendants questioned and arrested him.

There is dispute as to how much time expired between that and whether it was 5 minutes or 20 minutes. There are conflicts in testimony regarding the amount of force with which plaintiff touched the Vice President. It has been described various ways as a push, a tap, a pat, a slap, a hand placed on the shoulder or arm, a strike or a touch.

Agent Wurst testified that plaintiff made a [74] "push-off move." Doyle stated that the plaintiff "abruptly slapped" the Vice President's shoulder. Daniels and McLaughlin originally reported that plaintiff merely placed his hand on the Vice President's shoulder.

Agent Reichle does not dispute that plaintiff's speech is constitutionally protected and that an arrest would shield a person's speech and thus argues that he did not arrest plaintiff based on his comments but, instead, for the way he touched the Vice President and that touching was the substantial reason for the arrest. And that is taken from page 22 of the Reichle brief.

Thus, contrary to defendants' argument, the manner in which the plaintiff touched the Vice President is material under the totality of the circumstances test used to determine probable cause in an arrest for assault and/or harassment.

There are conflicts regarding the Vice President's reaction to the plaintiff's advances. The Vice President's aide, say Charles Durkin, stated the Vice President remained very calm during his interaction with plaintiff. In contrast, the White House photographer, Dave Bohrer, stated that the Vice President looked visibly startled by plaintiff. Once again, the nature of the Vice President's reaction goes to the totality of the circumstances that a reasonable officer would have to take [75] into account when determining whether probable cause existed for an arrest.

There are also conflicts regarding plaintiff's behavior during questioning by Agent Reichle. Plaintiff claims that he did not attempt to resist arrest but merely backed up a couple of inches or a foot from Reichle to look for his son. Reichle, in contrast, claims that plaintiff became overly agitated, tried to elude him and forcibly resisted his questioning and arrest.

Each of these conflicting issues of fact must be resolved by a jury and not by the Court on summary judgment.

With respect to retaliation, Daniels and McLaughlin also argued that there is no question of fact regarding plaintiff's First Amendment retaliation claim because they could not hear what plaintiff said to Vice President Cheney. Therefore, they argue they could not have retaliated against him on the basis of whatever it was plaintiff said to Cheney.

However, there is a question of fact on this element, as well. There are conflicting accounts

regarding which defendant knew what about plaintiff's cell phone conversation, when defendants knew it, and whether the conversation should be used to support probable cause. Thus, this question should go to the jury, as well.

[76] Plaintiff can also satisfy the second prong of his qualified immunity burden. Defendants cannot seriously dispute the right to be free from unreasonable warrantless arrest and search was not clearly established at the time plaintiff was arrested and searched. Nor can defendants seriously dispute that plaintiff's right to be free from retaliation for exercise of his free speech rights was not clearly established.

Defendants try to create an issue as to whether plaintiff had a legal right to resist arrest but, by the time plaintiff allegedly resisted arrest, his constitutional rights had already been violated. Thus, the Court declines to adopt defendants' arguments on this prong of the qualified immunity analysis.

In conclusion, the Court finds that numerous issue of material fact exist that must be determined by a jury. Plaintiff has come forward with enough information to meet this two-part qualified immunity burden for purposes of a motion for summary judgment. Accordingly, the Court hereby denies the Motion for Summary Judgment filed by defendants Reichle and Doyle, and also denies the Motion for Summary Judgment filed by defendants Daniels and McLaughlin.

Now, that brings to us the motion which was filed by Mr. Lane for continuance of the trial. In that motion, [77] Mr. Lane indicates that he has consulted with at least one of the opposing counsel.

Mr. Gallagher, do you have any statement to make with respect to the motion?

MR. GALLAGHER: Yes. Your Honor. We have now had an opportunity to consult with our clients. We do not object to what we characterize as a short continuance of the trial. I am mindful of Mr. Lane's schedule, as well. Our hope is that we would like to try this case as soon as we can though.

MR. LANE: I am taking from that statement that we are not looking at interlocutory appeals going up on all of this.

THE COURT: Well, I don't think there is a basis for an interlocutory appeal because my decision is based on the facts and not on the law.

MR. LANE: Okay. And I just want to make all this very clear.

THE COURT: And I don't know. I won't speak for counsel. They may have something else in mind. But if there is an interlocutory appeal, that would affect the trial date, as well.

MR. GALLAGHER: Your Honor, at this point in time, I have not had a chance to analyze those issues, so I want to make it crystal clear, we are

not representing to the [78] Court today we will not file an interlocutory appeal.

THE COURT: All right.

MR. WESTFALL: Your Honor, it is the same thing for Daniels and McLaughlin. Obviously, I have taken as extensive notes as I could based upon Your Honor's comments from the bench today. We will immediately order a transcript. I will review it and review whether, in fact, we do believe there is an ability or sufficient collateral legal issues under the *Cohen v. Beneficial Finance* doctrine as in has been interpreted in this context that would allow us to seek an interlocutory appeal.

So I will have to make that decision. So I will represent to the Court I will do so promptly and get my clients' guidance.

THE COURT: Understood. All right. With that in mind, let's go ahead and then set – the Court will grant the Motion for Continuance, and has looked at its calendar. The earliest date that I would have available for a full week trial would be September 28th.

MR. LANE: That works for me, Your Honor.

MR. WESTFALL: That would work for me, Your Honor, as well.

MR. GALLAGHER: Your Honor, that also works for me.

THE COURT: I was looking at final trial prep [79] conference date of September 11th at 9 a.m.

MR. WESTFALL: Fine for Agents Daniels and McLaughlin, Your Honor.

MR. GALLAGHER: Your Honor, it works for us, as well.

THE COURT: Mr. Lane?

MR. LANE: What was date?

THE COURT: September 11th at 9:00 a.m.

MR. LANE: That works.

THE COURT: Then the trial of this case will be scheduled for 9:00 a.m. on September 28th, and it is scheduled for a week-long trial – five-day jury trial, with a final trial prep conference at 9:00 a.m. on September 11th.

Are there any further matters to be brought to the Court's attention?

MR. LANE: No, Your Honor.

MR. GALLAGHER: Nothing from defendants Reichle and Doyle.

MR. WESTFALL: No, Your Honor.

THE COURT: Thank you. Court will be adjourned.

(Proceedings conclude at 10:55 a.m.)

[80] REPORTER'S CERTIFICATE

I, Darlene M. Martinez, Official Certified shorthand Reporter for the United States District Court, District of Colorado, do hereby certify that the foregoing is a true and accurate transcript of the proceedings had as taken stenographically by me at the time and place aforementioned.

Dated this 21st day of April, 2009.

s/ Darlene M. Martinez

RMR, CRR

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEVEN HOWARDS,

Plaintiff-Appellee,

v.

DANIEL McLAUGHLIN, in his individual and official capacity, et al.,

Defendants-Appellants,

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity, et al.,

Defendants.

UNITED STATES OF AMERICA,

Amicus Curiae.

No. 09-1201

STEVEN HOWARDS,

Plaintiff-Appellee,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity, et al.,

Defendants-Appellants,

No. 09-1202

DANIEL McLAUGHLIN,
in his individual and official capacity, et al.,

Defendants,

UNITED STATES OF AMERICA,

Amicus Curiae.

ORDER

(Filed April 25, 2011)

Before **KELLY**, **SEYMOUR**, and **LUCERO**, Circuit Judges.

Appellants Dan Doyle and Virgil D. "Gus" Reichle, Jr.'s petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

United States Statutes

Title 18. Crimes and Criminal Procedure

Part II. CRIMINAL PROCEDURE

Chapter 203. ARREST AND COMMITMENT

§ 3056. Powers, Authorities, and Duties of United States Secret Service

(a) Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons:

(1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect.

(2) The immediate families of those individuals listed in paragraph (1).

(3) Former Presidents and their spouses for their lifetimes, except that protection of a spouse shall terminate in the event of remarriage unless the former President did not serve as President prior to January 1, 1997, in which case, former Presidents and their spouses for a period of not more than ten years from the date a former President leaves office, except that –

(A) protection of a spouse shall terminate in the event of remarriage or the divorce from, or death of a former President; and

(B) should the death of a President occur while in office or within one year after leaving office, the spouse shall receive

protection for one year from the time of such death:

Provided, That the Secretary of Homeland Security shall have the authority to direct the Secret Service to provide temporary protection for any of these individuals at any time if the Secretary of Homeland Security or designee determines that information or conditions warrant such protection.

(4) Children of a former President who are under 16 years of age for a period not to exceed ten years or upon the child becoming 16 years of age, whichever comes first.

(5) Visiting heads of foreign states or foreign governments.

(6) Other distinguished foreign visitors to the United States and official representatives of the United States performing special missions abroad when the President directs that such protection be provided.

(7) Major Presidential and Vice Presidential candidates and, within 120 days of the general Presidential election, the spouses of such candidates. As used in this paragraph, the term "major Presidential and Vice Presidential candidates" means those individuals identified as such by the Secretary of Homeland Security after consultation with an advisory committee consisting of the Speaker of the House of Representatives, the minority leader of the House of Representatives, the

majority and minority leaders of the Senate, and one additional member selected by the other members of the committee. The Committee shall not be subject to the Federal Advisory Committee Act (5 App. U.S.C. 2).

(8) Former Vice Presidents, their spouses, and their children who are under 16 years of age, for a period of not more than six months after the date the former Vice President leaves office. The Secretary of Homeland Security shall have the authority to direct the Secret Service to provide temporary protection for any of these individuals at any time thereafter if the Secretary of Homeland Security or designee determines that information or conditions warrant such protection.

The protection authorized in paragraphs (2) through (8) may be declined.

(b) Under the direction of the Secretary of Homeland Security, the Secret Service is authorized to detect and arrest any person who violates –

(1) section **508, 509, 510, 871,** or **879** of this title or, with respect to the Federal Deposit Insurance Corporation, Federal land banks, and Federal land bank associations, section 213, 216,[1] 433, 493, 657, 709, 1006, 1007, 1011, 1013, 1014, 1907, or 1909 of this title;

(2) any of the laws of the United States relating to coins, obligations, and securities of the United States and of foreign governments; or

(3) any of the laws of the United States relating to electronic fund transfer frauds, access

device frauds, false identification documents or devices, and any fraud or other criminal or unlawful activity in or against any federally insured financial institution; except that the authority conferred by this paragraph shall be exercised subject to the agreement of the Attorney General and the Secretary of Homeland Security and shall not affect the authority of any other Federal law enforcement agency with respect to those laws.

(c) (1) Under the direction of the Secretary of Homeland Security, officers and agents of the Secret Service are authorized to –

(A) execute warrants issued under the laws of the United States;

(B) carry firearms;

(C) make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony;

(D) offer and pay rewards for services and information leading to the apprehension of persons involved in the violation or potential violation of those provisions of law which the Secret Service is authorized to enforce;

(E) pay expenses for unforeseen emergencies of a confidential nature under the direction

of the Secretary of Homeland Security and accounted for solely on the Secretary's certificate; and

(F) perform such other functions and duties as are authorized by law.

(2) Funds expended from appropriations available to the Secret Service for the purchase of counterfeits and subsequently recovered shall be reimbursed to the appropriations available to the Secret Service at the time of the reimbursement.

(d) Whoever knowingly and willfully obstructs, resists, or interferes with a Federal law enforcement agent engaged in the performance of the protective functions authorized by this section or by section 1752 of this title shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(e) (1) When directed by the President, the United States Secret Service is authorized to participate, under the direction of the Secretary of Homeland Security, in the planning, coordination, and implementation of security operations at special events of national significance, as determined by the President.

(2) At the end of each fiscal year, the President through such agency or office as the President may designate, shall report to the Congress –

(A) what events, if any, were designated special events of national significance for

security purposes under paragraph (1); and

(B) the criteria and information used in making each designation.

(f) Under the direction of the Secretary of Homeland Security, the Secret Service is authorized, at the request of any State or local law enforcement agency, or at the request of the National Center for Missing and Exploited Children, to provide forensic and investigative assistance in support of any investigation involving missing or exploited children.

(g) The United States Secret Service shall be maintained as a distinct entity within the Department of Homeland Security and shall not be merged with any other Department function. No personnel and operational elements of the United States Secret Service shall report to an individual other than the Director of the United States Secret Service, who shall report directly to the Secretary of Homeland Security without being required to report through any other official of the Department.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

July 12, 2011

Mr. Sean R. Gallagher
Polsinelli Shughart PC
1515 Wynkoop St.
Suite 600
Denver, CO 80202

Re: Virgil D. Reichle, Jr., et al.
v. Steven Howards
Application No. 11A47

Dear Mr. Gallagher:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Sotomayor, who on July 12, 2011 extended the time to and including August 25, 2011.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ [Illegible]
Sandy Spagnolo
Case Analyst

NOTIFICATION LIST

Mr. Sean R. Gallagher
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Clerk
United States Court of Appeals
for the Tenth Circuit
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Denver, CO 80257

AMICUS CURIAE BRIEF

No. 11-262

In the Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR., ET AL., PETITIONERS

v.

STEVEN HOWARDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether petitioners, Secret Service agents on the Vice President's protective detail, may be personally liable for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on a claim of retaliatory arrest in violation of the First Amendment, when the arrest was supported by probable cause.

STATEMENT OF COMPLIANCE WITH SUPREME COURT RULE 37.2(a)

Counsel of record received timely notice of the United States' intent to file this amicus curiae brief ten days before the due date. Pursuant to Rule 37.4, the consent of the parties is not required for the United States to file this brief.

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In the Supreme Court of the United States

No. 11-262

VIRGIL D. "GUS" REICHLE, JR., ET AL., PETITIONERS

v.

STEVEN HOWARDS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The court of appeals held in this case that two Secret Service agents on the Vice President's protective detail may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory arrest in violation of the First Amendment, when the arrest was supported by probable cause. The United States has a substantial interest in the proper resolution of that issue. The United States Secret Service is a federal agency required by statute to protect the President and Vice President (and, if applicable, the President-elect and Vice President-elect) and authorized by statute to protect other listed persons, including certain political candidates and foreign dignitaries. 18 U.S.C. 3056(a) (2006 & Supp. II 2008). The court of appeals' decision imposes potential

constitutional-tort liability on agents performing those vital duties. The decision also more generally affects the standards applicable to other law-enforcement agents carrying out arrests for federal crimes.

STATEMENT

1. This case arises out of a June 16, 2006 visit by then-Vice President Richard Cheney to a mall in Beaver Creek, Colorado. Pet. App. 3. Petitioners are Secret Service agents—Protective Intelligence Coordinator Gus Reichle and Special Agent Dan Doyle—who were assigned to the Vice President's protective detail during that visit. *Ibid.*

Respondent, who was also at the mall that day, was arrested by the Secret Service following a physical encounter with the Vice President. Pet. App. 3-9. Respondent first came to the attention of the Vice President's Secret Service detail when Agent Doyle overheard him say into his cell phone, "I'm going to ask [the Vice President] how many kids he's killed today." *Id.* at 4. Respondent was carrying a bag, and there were no metal detectors in the area. *Id.* at 8; Appellants' C.A. App. 112, 126.

Respondent waited to meet the Vice President, approached the Vice President, and told the Vice President that his "policies in Iraq are disgusting." Pet. App. 4-5. As respondent departed, he brought his hand into contact with the Vice President's shoulder. *Id.* at 5. Respondent characterizes the contact as "an open-handed pat," *id.* at 5 n.2, but that characterization is disputed. Other witnesses described the contact as a "'push[] off' the Vice President's shoulder," "'a get-your-attention-type touch,'" "a 'slap,'" "a 'forceful touch,'" and "a strike that caused 'the Vice President's shoulder to dip.'"

Id. at 5 (citations and brackets omitted). Agent Doyle did not overhear the conversation between respondent and the Vice President, but he did see the physical contact. *Ibid.*

Two other agents on the protective detail who had witnessed the incident decided that it warranted investigation by a Secret Service protective intelligence team. Pet. App. 5. Agent Reichle was dispatched to conduct the interview. *Id.* at 6. Agent Reichle had neither overheard respondent's cell-phone statement nor observed respondent's encounter with the Vice President, and thus relied on Agent Doyle to bring him up to speed. *Ibid.*

Respondent briefly went to another part of the mall after his encounter with the Vice President, but then returned to the area, at which point Agent Reichle approached him. Pet. App. 6. Unbeknownst to Agent Reichle, respondent was looking for his son, who had wandered off. *Ibid.* Agent Reichle presented his Secret Service badge, identified himself, and asked to speak with respondent. *Id.* at 7. Respondent refused. *Ibid.* Agent Reichle then stepped in front of respondent and asked respondent if he had assaulted the Vice President. *Ibid.* Respondent pointed his finger at Agent Reichle, denied assaulting the Vice President, and said, "if you don't want other people sharing their opinions, you should have [the Vice President] avoid public places." *Ibid.* According to respondent, Agent Reichle became "visibly angry" when respondent voiced his opinion about the war in Iraq. *Ibid.*

Agent Reichle asked respondent whether he had touched the Vice President. Pet. App. 7. Respondent falsely stated that he had not. *Ibid.* Agent Reichle asked nearby agents whether they had witnessed the

incident. *Id.* at 8. Agent Doyle confirmed that he had witnessed it and performed a demonstration (the accuracy of which is disputed) of petitioner's physical contact with the Vice President. *Id.* at 8 & n.3.

Based upon respondent's "premeditation, the conversation on the cell phone, the fact that [respondent] would not talk to him, the fact that he's walking around with a bag in his hand in an unmagged [no metal detector] area, and the fact that Doyle told him that [respondent] had unsolicited contact," Agent Reichle decided to arrest respondent for assaulting the Vice President. Pet. App. 8 (brackets omitted). Agent Doyle and other agents assisted in restraining respondent during the arrest. *Ibid.* Respondent was turned over to local law enforcement and detained for several hours. *Ibid.* He was charged with state-law harassment, but the charges were later dismissed. *Id.* at 8-9.

2. Respondent filed a suit against petitioners and other Secret Service agents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that he had been arrested unlawfully and seeking money damages. Pet. App. 9. He claimed that his arrest violated the Fourth Amendment, because the agents lacked probable cause to believe that he had committed a crime. *Ibid.* He also claimed that the arrest violated the First Amendment, because the agents were retaliating against him for protected speech. *Ibid.* Petitioners and the other defendants moved for summary judgment, which the district court denied. *Ibid.*; see *id.* at 48-57.

3. The court of appeals reversed in part and affirmed in part. Pet. App. 1-43. The court concluded that respondent's Fourth Amendment claim should have been dismissed because, even "[r]eviewing the facts

through [respondent's] lens, there was probable cause to arrest him for a suspected violation of" 18 U.S.C. 1001, which prohibits making a materially false statement to a federal officer in a matter that falls within the jurisdiction of the federal government. Pet. App. 17. The court observed that respondent himself had conceded during his deposition that he had lied to Agent Reichle about whether he had touched the Vice President. *Id.* at 18-19. Because the court found that there was probable cause to arrest respondent for violating Section 1001, the court did not reach the question whether there was probable cause to arrest him for other offenses, such as assault on the Vice President (18 U.S.C. 1751(e)). Pet. App. 17 n.7.

The court of appeals concluded, however, that respondent's First Amendment retaliatory-arrest claim against petitioners could proceed to trial. Pet. App. 22-36. The court believed that respondent had made out a First Amendment claim against petitioners because (1) respondent had engaged in protected speech; (2) arrest is an injury that would tend to chill speech; and (3) the facts, taken in the light most favorable to respondent, "suggest[ed]" that petitioners (although not the other defendants) "may have been substantially motivated by [respondent's] speech when [respondent] was arrested." *Id.* at 23-26; see *id.* at 36-39 (concluding that the remaining defendants were entitled to qualified immunity on respondent's First Amendment claim).

The court rejected petitioners' argument that the existence of probable cause defeated respondent's retaliatory-arrest claim. The court of appeals recognized that, under this Court's decision in *Hartman* v. *Moore*, 547 U.S. 250 (2006), a plaintiff must plead and prove the absence of probable cause in order to maintain a First Amendment claim seeking damages for retalia-

tory *prosecution*. Pet. App. 29-31. It additionally recognized that several courts of appeals, both before and after *Hartman*, applied a similar rule in the context of a First Amendment claim seeking damages for retaliatory arrest. *Id.* at 29, 31-32. The court of appeals disagreed with those decisions and declined to apply *Hartman* in the context of retaliatory arrests, reasoning that retaliatory-arrest claims meaningfully differ from retaliatory-prosecution claims. *Id.* at 31-33. The court additionally refused to grant petitioners qualified immunity against respondent's retaliatory-arrest claim, *id.* at 35-36, concluding that the law on this issue was clearly established by pre-*Hartman* circuit precedent, *id.* at 34 n.14.

Judge Kelly concurred in part and dissented in part. Pet. App. 40-43. He would have held that petitioners enjoyed qualified immunity from the retaliatory-arrest claim, because, "when the arrest in this case occurred, the law simply was not clearly established (nor is it now) that *Hartman* only applied to retaliatory prosecutions and not retaliatory arrests." *Id.* at 41. He stated that there "is a strong argument" that *Hartman*'s absence-of-probable-cause requirement applies in both contexts and emphasized the existence of a circuit conflict on the issue. *Ibid.*

4. The court of appeals denied rehearing en banc. Pet. App. 62-63.

DISCUSSION

This Court should grant certiorari to review the court of appeals' decision. The decision is incorrect and fails to take proper account of this Court's decision in *Hartman* v. *Moore*, 547 U.S. 250 (2006). It directly conflicts with decisions in the Second, Eighth, and Eleventh

Circuits, none of which would expose law-enforcement officers to liability in these circumstances. And it concerns an issue of exceptional importance, threatening to impose unwarranted personal liability on Secret Service agents for performing their critical protective duties and to chill federal, state, and local law-enforcement activities more generally.

A. The Court Of Appeals Erred In Permitting Respondent's Retaliatory-Arrest Claim To Proceed Despite The Presence Of Probable Cause

The court of appeals correctly determined (Pet. App. 17) that probable cause supported petitioners' arrest of respondent. The arrest was therefore lawful under the Fourth Amendment, regardless of petitioners' subjective motivations. *Ibid.*; see, *e.g.*, *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080-2081 (2011); *Devenpeck* v. *Alford*, 543 U.S. 146, 153 (2004); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). As this Court has recognized, the Fourth Amendment's focus on objective circumstances, rather than subjective intent, "promotes evenhanded, uniform enforcement of the law." *al-Kidd*, 131 S. Ct. at 2080.

The court of appeals concluded, however, that respondent could sidestep the Fourth Amendment's objective focus on probable cause by challenging his arrest under the First Amendment. That conclusion, which would potentially permit a constitutional claim any time the circumstances of an otherwise-lawful arrest happen to implicate expressive activity, was incorrect.

1. As this Court has recognized, the particularized requirements of the Fourth Amendment already provide significant protections in circumstances involving First

Amendment interests. In *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), the Court rejected the argument that First Amendment concerns require the application of special procedures, above and beyond the Fourth Amendment's protections, when police seek to search a newspaper's offices. *Id.* at 563-567. The Court stated that, "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." *Id.* at 565.

Although *Zurcher* focused on warrants, it is similarly true that the Fourth Amendment's requirement of probable cause as a prerequisite to an arrest imposes a significant limitation on any use of the arrest power to suppress expressive activity. An officer cannot simply arrest anyone whose speech displeases him; rather, he may lawfully arrest a suspect only when the circumstances, "'viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause" to believe the suspect has committed a crime. *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996)). That standard "protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" *Id.* at 370 (quoting *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949)).

This Court has recognized that the existence of probable cause supporting a law-enforcement action substantially addresses concerns about a motivation to suppress protected expression. In *Hartman* v. *Moore*, *supra*, the Court addressed the requirements for a plaintiff to re-

cover damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on a claim that criminal investigators had violated his First Amendment rights by inducing a criminal prosecution in retaliation for his protected speech. The Court noted that in such retaliatory-prosecution cases, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Hartman*, 547 U.S. at 261. "Demonstrating that there was no probable cause for the underlying criminal charge," the Court explained, "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution." *Ibid.* Conversely, "establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Ibid.*

The Court held that a plaintiff asserting a constitutional-tort claim for retaliatory prosecution must both plead and prove the absence of probable cause. *Hartman*, 547 U.S. at 252. The Court noted that, while "retaliatory actions * * * for speaking out" are constitutionally forbidden "as a general matter," *id.* at 256, recovery is appropriate only where retaliation is the "but-for cause" of the official's action. *Id.* at 256, 260; see *id.* at 260 ("It may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway."). The Court explained that "the need to prove a chain of causation from animus to injury, with details specific to retaliatory-

prosecution cases, * * * provides the strongest justification for [a] no-probable-cause requirement" in the context of a constitutional-tort claim alleging retaliatory prosecution. *Id.* at 259.

The Court identified two primary features of retaliatory-prosecution cases that distinguish them from "standard" retaliation cases, *Hartman*, 547 U.S. at 260, and that support a requirement to prove an absence of probable cause. First, "litigating probable cause will be highly likely in any retaliatory-prosecution case, owing to its powerful evidentiary significance" on the issue of causation. *Id.* at 261. The Court reasoned that "[t]he issue is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense." *Id.* at 265.

Second, "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury" in a retaliatory-prosecution case "is usually more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. "A *Bivens* (or § 1983) action for retaliatory prosecution," the Court observed, "will not be brought against the prosecutor, who is absolutely immune," but instead against a non-prosecutor official "who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 261-262. "Thus," the Court explained, "the causal connection required [in such a suit] is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person [the investigator] and the action of another [the prosecutor]." *Ibid.* Proof of the absence of probable cause would provide an evidentiary "link" to "bridge [that] gap." *Ibid.*

2. The court of appeals erred in deeming *Hartman* inapplicable to this case. Assuming that *Bivens* authorizes a private damages claim alleging that a law-enforcement officer arrested a suspect for retaliatory reasons, *Hartman*'s no-probable-cause requirement would apply to such a claim. Retaliatory-arrest cases, like retaliatory-prosecution cases, are materially distinct from "standard" retaliation cases. *Hartman*, 547 U.S. at 260. Retaliatory-arrest cases likewise will present "a distinct body of highly valuable circumstantial" probable-cause evidence that is "apt to prove or disprove retaliatory causation." *Id.* at 261. Thus, as in retaliatory-prosecution cases, the issue of probable cause is "likely to be raised by some party at some point" in a retaliatory-arrest case, and a showing of its absence "can be made mandatory with little or no added cost." *Id.* at 265.

In addition, in retaliatory-arrest cases, as in retaliatory-prosecution cases, the retaliation inquiry "is usually much more complex than it is in other retaliation cases," therefore "support[ing] a requirement that no probable cause be alleged and proven." *Hartman*, 547 U.S. at 261. A plaintiff's burden to "show a causal connection between a defendant's retaliatory animus and subsequent injury," *id.* at 259, raises particular complications in the retaliatory-arrest context because speech can be an entirely legitimate consideration in deciding whether to make an arrest. For starters, expressive activity may provide evidence of a crime and thus be directly relevant to the probable-cause determination. See, *e.g.*, *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (considering suspect's statements in addressing probable cause to arrest him for threatening the President); *Wayte* v. *United States*, 470 U.S. 598, 612-613

(1985) (noting that protest letters written to the Selective Service "provided strong, perhaps conclusive evidence" of an element of the criminal offense of failing to register for the draft).

Additionally, expressive activity is often relevant to an officer's decision about whether an arrest would make sense under the circumstances. Officers do not—and could not—arrest every person as to whom probable cause exists, and there is accordingly a "well established tradition of police discretion" in deciding whether a custodial arrest is warranted. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760 (2005); see also *Chicago* v. *Morales*, 527 U.S. 41, 62 n.32 (1999) (observing that it is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances"). The Court has never held that officers are forbidden from considering a suspect's speech in making that discretionary decision, nor would such a rule make sense. In deciding whether to arrest someone for trespassing on government property, for example, an officer should be able to consider that a suspect who belligerently states, "the government has no right to own property," is less likely to leave promptly of his own accord than a suspect who immediately apologizes for a mistaken intrusion. Cf. *Wayte*, 470 U.S. at 614 (rejecting interpretation of the First Amendment that "would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law").

At least in cases where the suspect's expressive activity is relevant to the arrest decision, the difficulty of determining whether legitimate or potentially illegitimate speech-related considerations caused the arrest means that the retaliation inquiry will "usually [be]

more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261; cf., *e.g.*, *Pickering* v. *Board of Educ.*, 391 U.S. 563, 572-573 (1968) (noting that certain potentially legitimate reasons for considering speech in firing public employee were "neither shown nor can be presumed"). As in *Hartman*, the complexity "should be addressed specifically in defining the elements of the tort," 547 U.S. at 261, because the jury (and the district court, when it addresses a dispositive motion) will otherwise lack any consistent, objective criteria for distinguishing tortious from non-tortious government action. And as in *Hartman*, "[b]ecause showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case." *Id.* at 265-266.*

3. In light of the likelihood that significant complexity will exist, the potential difficulty of deciding whether an individual case happens to lack such complexity, and the low probability that there will ever be conclusive evidence of retaliation, a requirement to plead and prove the absence of probable cause is fully justified in retaliatory-arrest cases. See *Hartman*, 547 U.S. at 261, 264 & n.10 (applying a blanket no-probable-cause requirement in retaliatory-prosecution cases based on sim-

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* In addition to the complexity of distinguishing legitimate from potentially illegitmate speech-related considerations, retaliatory-arrest cases can also involve the same complexity that was present in *Hartman*: a lack of identity between the defendant alleged to have a retaliatory motive and the official who decided to take the challenged action. See 547 U.S. at 262. Respondent's suit against Agent Doyle is an example. Agent Reichle made the decision to arrest respondent, Pet. App. 8, and the claim against Agent Doyle appears to be premised on the theory that Agent Doyle encouraged that decision.

ilar considerations). Unlike "standard" retaliation cases—which may involve questions of, for example, public employment—retaliatory-arrest cases by nature implicate public safety. That context supports conditioning liability on demonstrating a lack of probable cause, a standard that strikes the appropriate balance between the interest in protecting individuals from unreasonable law-enforcement interference and the interest in enabling officers to preserve the public safety. *E.g.*, *Pringle*, 540 U.S. at 370.

A no-probable-cause requirement is particularly warranted in the circumstances of this case. Petitioners were tasked with the critically important job of guarding the Vice President's safety. 18 U.S.C. 3056(a)(1); cf. *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive."). This Court has recognized that when a person presents a potential threat to the Vice President, an officer guarding the Vice President is "required to recognize the necessity to protect the Vice President by securing [the person] and restoring order to the scene." *Saucier* v. *Katz*, 533 U.S. 194, 208 (2001), overruled in part on other grounds by *Pearson* v. *Callahan*, 555 U.S. 223 (2009); see 533 U.S. at 197-198. It was not merely legitimate, but prudent, for petitioners to take account of respondent's vocal criticism of the Vice President as part of the totality of circumstances in assessing whether respondent presented a threat and should be arrested and removed from the area. The Secret Service can reasonably conclude that someone whose disagreement with the Vice President has already led to unsolicited physical contact presents more of a security risk than someone who, for example, bumped

into the Vice President accidentally. See Pet. App. 8 (Agent Reichle's testimony that he arrested respondent based upon his "premeditation, the conversation on the cell phone, the fact that [respondent] would not talk to him, the fact that he's walking around with a bag in his hand in an [area without a metal detector], and the fact that [Agent Doyle said] he had unsolicited contact" with the Vice President) (brackets omitted). The court of appeals erred in subjecting petitioners to potential damages liability for exercising their professional judgment about the need for an arrest to ensure the Vice President's safety.

The court of appeals compounded its error by denying petitioners qualified immunity from respondent's claims. "[T]o ensure that fear of liability will not 'unduly inhibit officials in the discharge of their duties,'" the qualified-immunity doctrine provides that "so long as they have not violated a 'clearly established' right," officials "are shielded from personal liability." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (citations omitted). This Court has never held that an arrest supported by probable cause can nonetheless violate the First Amendment, and, as discussed below, the circuits are divided on that question. To the extent that the court of appeals believed the issue to have been settled by its pre-*Hartman* precedent, see Pet. App. 34 n.14, an officer could reasonably conclude that *Hartman* altered the legal landscape. The qualified-immunity doctrine thus should protect petitioners from respondent's suit. Cf. *Hunter*, 502 U.S. at 229 (observing that qualified immunity's "accommodation for reasonable error" is "nowhere more important than when the specter of Presidential assassination is raised").

B. The Court Of Appeals' Decision Conflicts With The Holdings Of Other Circuits

As the court of appeals itself recognized (Pet. App. 29, 31-32), its conclusion in this case conflicts with the decisions of several other circuits. Three circuits categorically foreclose a First Amendment damages claim for retaliatory arrest against an officer whose actions are supported by probable cause. Among the courts that have squarely addressed the question, only the court of appeals here—and possibly, in some circumstances, the Ninth Circuit—would allow such a claim to proceed.

1. Even before *Hartman*, both the Second and Eleventh Circuits had held that an officer who has probable cause to arrest a suspect may not be found liable under the First Amendment for retaliatory arrest. In *Curley* v. *Village of Suffern*, 268 F.3d 65 (2001), the Second Circuit rejected a former political candidate's claim that his arrest was in retaliation for his criticism of the police commissioner and police chief, reasoning that "because defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be undertaken." *Id.* at 73. Similarly, the Eleventh Circuit in *Dahl* v. *Holley*, 312 F.3d 1228 (2002), held that "the existence of probable cause to arrest Dahl defeat-[ed]" her claim that "she was arrested in retaliation for her constitutionally protected speech against the police department's recruitment and use of confidential informants." *Id.* at 1236.

Indeed, under both circuits' precedent, a law-enforcement officer would likely receive qualified immunity from First Amendment retaliatory-arrest liability in any case where there is "arguable" probable cause. The Eleventh Circuit has squarely held, and the Second Circuit has suggested, that qualified immunity is appro-

priate in any case where an officer in the defendant's position could reasonably believe that probable cause supported the arrest, even if such a belief would be mistaken. See *Redd* v. *City of Enterprise*, 140 F.3d 1378, 1383 (11th Cir. 1998) ("Because we hold that the officers had arguable probable cause to arrest Anderson for disorderly conduct, we must hold that the officers are also entitled to qualified immunity from the plaintiffs' First Amendment claims."); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995) ("[I]f the officer either had probable cause or was qualifiedly immune from subsequent suit (due to an objectively reasonable belief that he had probable cause), then we will not examine the officer's underlying motive in arresting and charging the plaintiff."), cert. denied, 517 U.S. 1189 (1996); see also *Phillips* v. *Irvin*, 222 Fed. Appx. 928, 929 (11th Cir. 2007) (post-*Hartman* decision relying on *Redd* for the proposition that to receive qualified immunity from a First Amendment retaliatory-arrest claim, the defendant "only needed to establish *arguable* probable cause").

Following *Hartman*, the Eighth Circuit reached a similar conclusion. The Eighth Circuit's decision in *McCabe* v. *Parker*, 608 F.3d 1068 (2010), like the court of appeals' decision here, involved an arrest initiated by Secret Service agents in their protective capacity—in that case, at a political rally where then-President George W. Bush was scheduled to speak. *Id.* at 1070-1073. The court held in *McCabe* that the plaintiffs' First Amendment retaliatory-arrest claim failed because "[t]he totality of the circumstances present in this case support[ed] a finding of arguable probable cause" to believe that the plaintiffs had violated 18 U.S.C. 3056(d), which prohibits resisting federal law-enforcement offi-

cers in the performance of their statutorily authorized protective functions. 608 F.3d at 1078-1079; see also *id.* at 1075 (citing *Williams* v. *City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007), for the proposition that *Hartman* applies to retaliatory-arrest claims). Thus, under the Eighth Circuit's rule, as well as the similar rules in the Second and Eleventh Circuits, petitioners in this case would not be facing constitutional liability for a retaliatory arrest.

2. The court of appeals purported (Pet. App. 32) to find support for its contrary conclusion in the Ninth Circuit's decision in *Skoog* v. *County of Clackamas*, 469 F.3d 1221 (2006). The Ninth Circuit in that case found *Hartman*'s no-probable-cause requirement inapplicable to a plaintiff's claim that a police officer had obtained and executed a warrant in retaliation for filing a lawsuit. *Id.* at 1231-1235. Subsequent Ninth Circuit decisions, however, have sometimes treated the absence of probable cause as an element of a First Amendment retaliatory-arrest claim. Compare *Beck* v. *City of Upland*, 527 F.3d 853, 863-864, 866, 869 (2008) (treating the absence of probable cause as an element of the plaintiff's retaliatory-arrest claim), with *Dietrich* v. *John Ascuaga's Nugget*, 548 F.3d 892, 900-901 (2008) (concluding that the absence of probable cause was not an element of the plaintiff's retaliatory-arrest claim). Although the Ninth Circuit appears to believe that its precedents on this issue are consistent, see *id.* at 901 n.5 (citing *Skoog* and *Beck*), the precise set of circumstances in which the Ninth Circuit will apply a no-probable-cause requirement is not entirely clear.

In any event, regardless whether the Ninth Circuit would agree with the decision of the court of appeals here, the conflict between that decision and the deci-

sions of the Second, Eighth, and Eleventh Circuits warrants this Court's review. There is little chance that the court of appeals, which denied en banc review in this case despite its awareness of a circuit conflict, see Pet. App. 29, 31-32, 62-63, will resolve that conflict on its own. And the facts of this case highlight the difficulty that the conflict presents for federal law-enforcement officers. Secret Service agents may be called upon to perform their protective duties in any jurisdiction in the United States, and their training is intended to apply nationwide. It is untenable for an agent on a traveling protective detail to feel comfortable arresting suspects based on probable cause in some locations, but in other locations to have to worry about a lawsuit, a trial, and potential monetary liability. Cf. *al-Kidd*, 131 S. Ct. at 2087 (Kennedy, J., concurring) ("If national officeholders were subject to personal liability whenever they confronted disagreement among appellate courts, those officers would be deterred from full use of their legal authority."). Other federal law-enforcement agents who must act across jurisdictional lines—including, for example, agents of the Federal Bureau of Investigation, the Drug Enforcement Administration, or the Internal Revenue Service—would face similar concerns. This Court's intervention is necessary to ensure that federal law-enforcement officers can carry out their duties consistently and without concern about unwarranted *Bivens* suits.

C. The Petition Presents A Question Of Recurring Importance

The question presented in this case is of broad significance to law-enforcement officers in general and the Secret Service in particular. The Court granted certio-

rari in *Hartman* to address a similar circuit conflict concerning the requirements to plead and prove a First Amendment retaliatory-prosecution claim. 547 U.S. at 255-256. The analogous issue in the context of allegedly retaliatory arrests potentially has far greater importance. In the most recent year for which final data are available, state and local law-enforcement agencies alone made more than 13.5 million arrests. Federal Bureau of Investigation, *Crime in the United States, 2009*, http:// www2.fbi.gov/ucr/cius2009/data/table_29.html (Sept. 2010). Furthermore, in the common scenario where there is both an arrest and a prosecution, the court of appeals' decision enables a plaintiff to avoid *Hartman*'s no-probable-cause requirement simply by reframing his claim as one for retaliatory arrest rather than retaliatory prosecution.

The impact of the court of appeals' decision is not limited to cases in which a law-enforcement officer actually acts with a retaliatory motive, but instead extends to any case in which a plaintiff might plausibly claim that the officer has done so. Under the court of appeals' decision, if a suspect's comments form part of the backdrop against which the arrest takes place, and disturb or appear to anger the arresting officer, a trial is warranted. Pet. App. 25-26. On that view, practically anyone arrested for violating a valid time, place, or manner restriction, or any arrestee who directs a slur at officers before his arrest, could potentially proceed all the way to trial on a retaliatory-arrest claim. And "[b]ecause an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998)

(internal quotation marks and citation omitted). Indeed, the court of appeals' decision gives suspects the perverse incentive to make statements designed to anger officers in the hope that fear of constitutional-tort liability will deter arrest.

The court of appeals' decision creates especially difficult problems for Secret Service agents, who frequently operate in politically-charged environments. Cf. *Hunter*, 502 U.S. at 229 (Scalia, J., concurring in the judgment) (agreeing that Court should reverse even fact-bound error in *Bivens* suit against Secret Service agents because it is "worthwhile to establish that this Court will not let such a mistake stand with respect to those who guard the life of the President"). Those agents protect not only the President and Vice President, 18 U.S.C. 3056(a)(1), but also other political figures such as foreign heads of state (and, potentially, other foreign dignitaries), 18 U.S.C. 3056(a)(5)-(6), as well as presidential and vice-presidential candidates, 18 U.S.C. 3056(a)(7). They also sometimes provide security at "special events of national significance," 18 U.S.C. 3056(e)(1), which can include political activities like major-party presidential nominating conventions. In all of these situations, there is a high likelihood that the circumstances surrounding a potential arrest will involve expressive activity. See, *e.g.*, *Saucier*, 533 U.S. at 197-198 (detention of political protestor). In deciding whether the arrest is warranted, these agents "should not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (internal quotation marks and citation omitted). To prevent that possibility, and for the other reasons discussed above, this Court should grant certiorari and reverse the court of appeals' decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

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AMICUS CURIAE BRIEF

No. 11-262

IN THE
Supreme Court of the United States

VIRGIL D. REICHLE, JR. and DAN DOYLE,

Petitioners,

v.

STEVEN HOWARDS,

Respondent,

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICI CURIAE COLORADO AND TWENTY OTHER STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, as the Tenth Circuit siding with the Ninth Circuit held here, the existence of probable cause to make an arrest does not bar a First Amendment retaliatory arrest claim; or whether, as the Second, Sixth, Eighth, and Eleventh Circuits have held, probable cause bars such a claim.

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INTEREST OF AMICUS CURIAE

The State of Colorado and the twenty other amici states, respectfully submit this brief as *amici curiae* in support of the Petitioners. There is a deep split among the circuit courts regarding whether probable cause bars a First Amendment retaliatory arrest claim. In this case, the Tenth Circuit held that despite the fact that an arresting officer has probable cause for an arrest, the arrestee may still assert a First Amendment claim for retaliatory arrest. The Tenth Circuit's analysis misreads *Hartman v. Moore*, 547 U.S. 250 (2006), and deepens a circuit split by aligning Tenth Circuit law with the minority Ninth Circuit, and against the Sixth, Eighth and Eleventh Circuits.

The question presented is of great national importance to the interests of the *amici* states.

Protecting the public is one of the primary duties of state government, if not its primary duty. The twenty-one states represented in this brief employ thousands of law enforcement officials who enforce the laws and regulations, exercise powers of custody and arrest, restrain persons suspected of unlawful behavior, detect criminal activity, investigate complaints, incidents and accidents, interview witnesses, gather evidence, respond to emergencies and requests for assistance, write appropriate citations and reports, and testify in court proceedings. States have a vital interest in ensuring that their law enforcement personnel can make arrests based on probable cause without the fear that they will be forced to defend alleged subjective motives in court.

SUMMARY OF THE ARGUMENT

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that the existence of probable cause bars a claim for retaliatory prosecution brought under the First Amendment. This case presents the question of whether *Hartman* applies not only to retaliatory prosecutions, but also to retaliatory arrests.

There is a deep split among the circuit courts regarding whether probable cause bars a First Amendment retaliatory arrest claim. In this case, the Tenth Circuit held that, despite the fact that an arresting officer has probable cause for an arrest, the arrestee may still assert a First Amendment claim for retaliatory arrest. The Tenth Circuit's analysis misreads *Hartman*, and deepens a circuit split by aligning Tenth Circuit law with the minority Ninth

Circuit, and against the Sixth, Eighth and Eleventh Circuits.

There are several reasons why the *Hartman* rationale should apply to retaliatory arrest claims. To the extent a plaintiff's injuries stem from the filing of charges, the plaintiff is, in essence, claiming retaliatory prosecution and under *Hartman* must show the absence of probable cause. To the extent plaintiff's injuries derive from the seizure of his person, then a retaliatory arrest claim differs little from a traditional Fourth Amendment claim for which this Court has repeatedly held that an officer's subjective motivations are irrelevant.

To establish a First Amendment retaliatory arrest claim, a plaintiff must show that the arrest was substantially motivated by retaliation. An arrest is unlikely to be substantially motivated by retaliation when it is supported by probable cause.

There is simply no valid reason to consider an officer's subjective motives in a retaliatory arrest case because the existence of probable cause is so highly probative of causation.

Law enforcement officials are often called upon to make quick decisions in complicated situations. Applying the probable cause standard to First Amendment retaliatory arrest claims—instead of subjectively examining an officer's motivations—will provide law enforcement officers with clearer guidance, thus ensuring that their actions do not violate constitutional rights. The Court should grant the petition for certiorari and apply the *Hartman* rationale to retaliatory arrest claims.

REASONS FOR GRANTING THE PETITION

I. The split in the circuits has created inconsistency on an important question of qualified immunity.

In *Hartman*, this Court held that a plaintiff bringing a cause of action for retaliatory prosecution must prove as an element of his case that the prosecution was not supported by probable cause: "Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven." *Hartman*, 547 U.S. at 266. The circuits are split on the scope of that decision, creating confusion for law enforcement officials that only the intervention of this Court can resolve.

The circuit courts have divided on the question of whether *Hartman* extends to claims of retaliatory arrest. The Sixth, Eighth, and Eleventh Circuits have held that lack of probable cause is a necessary element of a retaliatory arrest claim under the First Amendment. *McCabe v. Parker*, 608 F.3d 1068, 1079 (8th Cir. 2010); *Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007); *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006); *Phillips v. Irvin*, 222 Fed. Appx. 928, 929, 2007 WL 914254 (11th Cir. March 28, 2007). The Tenth Circuit, however, joined the Ninth Circuit and "decline[d] to extend Hartman's "no-probable-cause" requirement to this retaliatory arrest case." *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011); *Skoog v. Cnty. Of Clackamus*, 469 F.3d 1221 (9th Cir. 2006); *but see, Dietrich v. Nugget*, 548 F.3d 892 (9th Cir. 2008). The Tenth Circuit majority

acknowledged the existence of the split amongst the circuits, noting, "[i]n the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests." 634 F.3d at 1147.

The Second Circuit has not addressed this issue since *Hartman*, but traditionally has required the absence of probable cause as an element in a retaliatory arrest claim. *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2nd Cir. 2001) ("As to the second element, because defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be undertaken.").

The Eighth Circuit addressed the application of *Hartman* to retaliatory arrests when the Secret Service arrested two women who refused to leave a secure area during a campaign rally. *McCabe*, 608 F.3d at 1070. The court held that "[l]ack of probable cause is a necessary element of all the claims [the

plaintiffs] brought arising from the allegedly unlawful arrests." *Id.* at 1075. The court supported this finding by citing *Hartman* for the proposition that "a plaintiff asserting a *Bivens* or § 1983 claim for an alleged unlawful citation arising from the exercise of First Amendment rights must plead and prove a lack of probable cause for the underlying charge." *Id.* This interpretation of this Court's precedent conflicts squarely with the Tenth Circuit's recent holding that, "[i]n light of the care the Supreme Court took to distinguish between complex and ordinary retaliation claims, we are not persuaded Hartman applies to" retaliatory arrest claims. *Howards*, 634 F.3d at 1148.

The Eleventh Circuit confronted this question when William Joseph Phillips sued Officer B.E. Irvin for retaliatory arrest after a traffic stop dispute. The circuit court assumed that if there was probable

cause for the arrest, then the officer enjoyed qualified immunity. The court addressed the related problem of arrests that were almost supported by probable cause, finding that the officer "only needed to establish *arguable* probable cause" not "*actual* probable cause." *Phillips*, at *1.

The Sixth Circuit is also on the majority side of the split, although a recent dictum suggests that, like the Ninth Circuit, it may suffer from some internal dispute about the scope of its rule. The key Sixth Circuit case is *Barnes v. Wright*. In *Barnes*, plaintiff claimed that he was arrested and indicted in violation of his First Amendment rights after he angrily accused the police of dereliction of duty. (The police maintained that the actual reason for his arrest was that he was waving a gun at them. *Barnes*, 449 F.3d at 712.) The Sixth Circuit held, "*Hartman* appears to acknowledge that its rule

sweeps broadly" and "Barnes' First Amendment retaliation claim fails as a matter of law" because "the defendants had probable cause to seek an indictment and to arrest Barnes on each of the criminal charges in this case." *Barnes*, 449 F.3d at 720. *See also, Everson v. Calhoun County*, 2011 WL 204453, 3 (6th Cir. 2011) (not selected for publication) (The plaintiff "is correct that § 1983 claims for retaliatory prosecution and arrest fail as a matter of law if the defendant had probable cause.").

But a subsequent case demonstrates that even within the Sixth Circuit, however, there is inconsistency about the application of *Hartman*. Another recent panel included a footnote saying, in dictum, that "[t]he Sixth Circuit has not decided whether lack of probable cause is an element in wrongful-arrest claims after the Supreme Court's ruling in *Hartman* which made lack of probable

cause an element for claims of malicious prosecution." *Kennedy v. City of Villa Hills, Ky.* 635 F.3d 210, 217, fn 4 (6th Cir. 2011) (citation omitted). The footnote distinguished *Barnes* by claiming, "*Barnes* governs the applicability of *Hartman* to claims of wrongful arrest only when prosecution and arrest are concomitant." *Id.*

The Ninth and Tenth Circuits disagree with the Second, Sixth, Eighth, and Eleventh Circuits on this important question of federal law. The Ninth Circuit first staked out the minority position, which the Tenth Circuit has joined, in *Skoog v. Clackamus*, 469 F.3d 1221 (9th Cir. 2006): "After close review of the relevant precedent we conclude that a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation." *Skoog*, 469 F.3d at 1232. The Ninth Circuit then diluted this holding in a subsequent case, *Dietrich v. Nugget*, 548

F.3d 892 (9th Cir. 2008). The plaintiff in *Dietrich* was asked to leave the West Nugget Rib Cook-Off, a barbeque organized by a private party on public property, and complained to the ACLU and the event organizers. Two days later, she was issued a traffic citation that she claimed was retaliatory. The Ninth Circuit held that the plaintiff did have a First Amendment right to engage in political activities at this cook-off but that no reasonable juror could find that the traffic citation was retaliatory. The Ninth Circuit in *Dietrich* characterized the holding in *Skoog* as a decision "that the retaliatory First Amendment claim survived summary judgment *when there was barely enough evidence to conclude that there was probable cause*, while there was strong evidence of a retaliatory motive." *Dietrich*, 469 F.3d at 901 (emphasis added).

The Tenth Circuit, by squarely holding, contrary to the position of the Second, Sixth, Eighth, and Eleventh Circuits, that Mr. Howard may "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest," has now widened this split. This Court should grant the petition for certiorari to establish national uniformity on this important law enforcement issue, straighten out the confusion in the lower courts, and clarify the meaning of its precedent.

II. The minority position of the Tenth and Ninth Circuits has made it more difficult for law enforcement officials to perform their duties.

This circuit split is not over a minor issue of merely intellectual interest. For its safety, the public relies on the hard work of the police, secret service agents, and numerous other law enforcement

officials. Every day, these men and women must balance their responsibility to enforce the law and prevent crime with their duty to respect the constitutional rights of the people. Qualified immunity provides invaluable protection to law enforcement professionals by ensuring that if they do not violate a clearly identified constitutional right, they will not be forced to defend their actions in court on pain of personal liability.

As this Court has explained, "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638, 3038 (1987).

These concerns are especially troubling when courts examine not the objective fact that probable

cause is established, but the subjective motivation of law enforcement. "There are special costs to 'subjective' inquiries," because "the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions...entail[ing] broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues" which "can be peculiarly disruptive of effective government." *Harlow v. Fitzgerald*, 457 U.S. 800, 816-17 (1982).

This type of second-guessing is especially problematic in the context of an arrest, when law enforcement officials are often called upon to make quick decisions in complicated situations. What the Court has said about the Fourth Amendment in the arrest context is equally true when the claims relating to an arrest derive from the First

Amendment: The Constitutional rule "[o]ften enough... has to be applied on the spur (and in the heat) of the moment," and the object is "to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). The probable cause standard, on which these employees are already trained and required to follow, provides clearer guidance to our law enforcement than complicated inquiry into subjective motives.

This is not an obscure question that will apply only to political protestors who create probable cause for an arrest. Many arrests, including arrests for very ordinary crimes, have a potential to implicate First Amendment claims. Criticizing the Vice President, just like cursing the police at a traffic

stop, is a fundamental constitutional right, but this speech by the arrestee should not deprive the secret service agents or police of their qualified immunity when they do their duty and make an arrest that is fully supported by probable cause.

This Court should grant certiorari to provide clear guidance to our secret service, police, and investigators about the standards governing their actions when faced with a person who has performed an act which creates cause for an arrest but also, as so often happens, made remarks which the law enforcement officer finds offensive.

III. The Tenth Circuit misapplied this Court's precedent, creating an unjustified and confusing exception to the availability of qualified immunity for claims of false arrest.

In *Hartman,* this Court held that the absence of probable cause must be alleged and proven by a

plaintiff bringing a § 1983 or *Bivens* suit for retaliatory prosecution. *Hartman* 547 U.S. at 265-66. The Tenth Circuit was wrong to exclude retaliatory arrest allegations from this rule.

The *Hartman* Court offered two reasons for requiring that plaintiffs in retaliatory prosecution cases establish that there was no probable cause. First, the issue of probable cause will likely be relevant in "any retaliatory prosecution case." 527 U.S. at 261. Second, "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases." *Id.*

As to the first reason, this Court explained, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not

probable cause to bring the criminal charge." *Id.* Thus, the issue of probable cause will necessarily have "powerful evidentiary significance." *Id.* This Court stated, "[b]ecause showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven." *Id.* at 265-66.

With regard to the second reason, this Court emphasized that a § 1983 or *Bivens* action is brought against an official who "may have influenced the prosecutorial decision but did not himself make it" rather than against the prosecutor, *id.* at 261-62, and that "requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases." *Id.* at 261. The Court explained,

"[s]ome sort of allegation ... is needed both to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action, and to address the presumption of prosecutorial regularity." *Id.* at 263. That "connection, to be alleged and shown, is the absence of probable cause." *Id.*

In this case, the panel majority appeared to believe that *Hartman* did not apply because it covers only cases in which causation issues are highly complex. This, however, is mistaken. As the Sixth Circuit recognized, the *Hartman* Court "appear[ed] to acknowledge that its rule sweeps broadly; the Court noted that causation in retaliatory prosecution cases is '*usually* more complex than it is in other retaliation cases.'" *Barnes v. Wright*, 449 F.3d at 720 (quoting *Hartman*, 527 U.S. at 261) (emphasis in *Barnes*). The Sixth and Eighth Circuits have concluded that *Hartman*'s ruling sweeps "broad[ly]

enough to apply even where intervening actions by a prosecutor are not present." *Williams*, 480 F.3d at 876 (adopting the reasoning of *Barnes*). *See also McCabe v. Parker*, 608 F.3d at 1079 (Secret service agent had arguable probable cause to arrest such that agent had qualified immunity in arrestees' action alleging violation of their First and Fourth Amendment rights); *see also Phillips*, 222 Fed. Appx. at 929 (applying similar reasoning even where arresting officers had only *arguable* probable cause).

This Court's ruling in *Hartman* should "sweep broadly" and apply to retaliatory arrest claims. Causation is not always complex even in retaliatory prosecution cases, and can be exceedingly complex in retaliatory arrest cases. While arrests are sometimes made by a single law enforcement officer, arrests are also often made based on information supplied to the arresting officer by other officers,

witnesses, and victims. The arresting officer must rely on these accounts to determine whether probable cause for the arrest exists. Thus, the "requisite causation between the defendant's retaliatory animus and the plaintiff's injury" will often be as complex in a claim for retaliatory arrest as in one alleging retaliatory prosecution.

There are several reasons why the *Hartman* rationale should apply to retaliatory arrest claims. At the outset, the distinction between a retaliatory prosecution claim and a retaliatory arrest claim is somewhat artificial. In both types of cases, the defendants are necessarily the arresting or investigating officers because of the prosecutor's absolute immunity. *Hartman*, 527 U.S. at 261-62. Moreover, an arrest is merely the first step in a prosecution. Insofar as the plaintiff's injuries stem from the filing of charges, the plaintiff, in essence, is

claiming retaliatory prosecution, and therefore under *Hartman*, must show the absence of probable cause.

Further, to the extent that a plaintiff's injuries derive from the seizure of his or her person, then the retaliatory arrest claim differs little from a traditional Fourth Amendment claim, for which this Court has repeatedly held that an officer's subjective motivations are irrelevant. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (stating, "an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause"); *Whren v. United States*, 517 U.S. 806, 813 (1996) (declaring "[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis."). The mere existence of probable cause will bar a claim arising under the Fourth Amendment.

To establish a First Amendment retaliation claim, a plaintiff must show that the arrest was "substantially motivated" by retaliation. *Howards*, 534 F.3d at 1144. Because the issue of probable cause will necessarily have "powerful evidentiary significance," and "[b]ecause showing an absence of probable cause will have high probative force," *Hartman*, 527 U.S. at 261, an arrest is unlikely to have been substantially motivated by retaliation when supported by probable cause, and the officer's subjective motives should be irrelevant.

Allowing consideration of an arresting officer's subjective motivations despite the existence of probable cause would allow innumerable plaintiffs to turn what would heretofore have been untenable Fourth Amendment claims into First Amendment retaliation claims. Any arrestee could claim that despite an officer's probable cause to believe the

arrestee had committed a crime, the *actual* reason for the arrest was retaliation for protected speech made or political position held by the arrestee. This would provide a perverse incentive to individuals who might be arrested: by making insulting or otherwise provocative statements, they could escape the *Whren* rule and provide themselves with a convenient basis for a § 1983 suit. It is not difficult to imagine a defense lawyer recommending the initiation of such a claim, if for no other reason than to influence the charging decision. For all practical purposes, qualified immunity for arresting officers would be eviscerated.

In *Hartman*, this Court cautioned that "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action

would have been taken anyway." 527 U.S. at 260. For Fourth Amendment claims and retaliatory prosecution claims, the existence of probable cause is sufficient proof that the action would have been taken anyway. Similarly, when a law enforcement officer makes an arrest fully supported by probable cause, the officer's alleged subjective motives do not amount to a constitutional violation because the arrest would have happened anyway. There is simply no valid reason to consider an officer's subjective motives in such circumstances because the existence of probable cause is so highly probative of causation.

Finally, subjecting law enforcement officers to potential liability when they make an arrest with objectively reasonable probable cause will in no way affect their future conduct, unless it is to make them

less willing to do their duties. *Cf. United States v. Leon*, 468 U.S. 897, 919-920 (1984).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and reverse the decision below.

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JOINT APPENDIX

RECORD
AND
BRIEFS

No. 11-262

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In The
Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR.,
DAN DOYLE,

Petitioners,

v.

STEVEN HOWARDS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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1:06-cv-01964-CMA-CBS Howards v. Reichle

31	*Filed & Entered:*	05/28/2007	Amended Complaint
41	*Filed & Entered:*	06/19/2007	Answer to Amended Complaint
47	*Filed & Entered:*	09/07/2007	Answer to Complaint
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169	*Filed & Entered:*	12/16/2008	Pretrial Order
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187	*Filed & Entered:*	04/14/2009	Order on Motion for Summary Judgment
189	*Filed & Entered:*	04/21/2009	Transcript

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Docket #: 09-1202
Howards v. Reichle, Jr., et al

07/02/2009 [9672144] Appellants deficient brief filed by Dan Doyle and Virgil D. "Gus" Reichle, Jr. In 09-1201 and 09-1202. Type of deficiency: brief is missing the required attachment(s). Appellants corrected brief due on 07/13/2009 for Dan Doyle and Virgil D. "Gus" Reichle Jr. [09-1201, 09-1202]

07/02/2009 [9672217] Amicus Curiae brief submitted by United States. Original and 7 copies. Served on 07/02/2009. Manner of Service: US mail, ECF/NDA. [09-1201, 09-1202] TLM

07/06/2009 [9672614] Appellant/Petitioner's brief filed by Dan Doyle and Virgil D. "Gus" Reichle, Jr. Original and 7 copies. Served on 07/06/2009 by ECF/NDA. Oral argument requested? Yes. [09-1202, 09-1201] SRG

09/08/2009 [9690863) Appellee/Respondent's brief filed by Steven Howards in 09-1201, 09-1202. Original and 7 copies. Served on: 09/08/2009. Manner of service: email. Oral argument requested? Yes. [09-1201, 09-1202) DAL

09/30/2009 [9697619) Appellant/Petitioner's reply brief filed by Dan Doyle and Virgil ID, "Gus" Reichle, Jr. Original and 7 copies, Served on 09/30/2009. Manner of Service: clerk. [09-1201, 09-1202] SRG

03/14/2011 [9848271] Affirmed in Part, Reversed in Part and Remanded; Terminated on the merits after oral hearing;Written, signed, published. Judges Kelly (concurring in part and dissenting in part), Seymour (authoring) and Lucero. Mandate to issue. [09-1201, 09-1202]

04/11/2011 [9856770] Petition for rehearing en banc filed by Dan Doyle and Virgil D. "Gus" Reichle, Jr.. Original and 18 copies. Served on 04/11/2011. Manner of Service: ECF/NDA. [09-1202, 09-1201] SRG

04/18/2011 [9858949] Amicus Curiae brief submitted by United States. 18 paper copies to be provided to the court. Served on 04/18/2011. Manner of Service: ECF/NDA. [09-1201, 09-1202] – [Edited 04/20/2011 by JM to remove the deficient brief.] TLM

04/18/2011 [9859048] Amicus Curiae brief submitted by The States of Colorado, Oklahoma, Utah, Wyoming, South Carolina, and Vermont. 18 paper copies to be provided to the court. Served on 04/18/2011. Manner of Service: email, US mail. [09-1201, 09-1202] – [Edited 04/20/2011 by KF. PDF removed from the entry. The brief was filed on 4/18/11 by KF] DJC

04/20/2011	[9859621] Amicus Curiae brief filed by The States of Colorado, Oklahoma, Utah, Wyoming, South Carolina, and Vermont in 09-1201 09-1202. Served on 04/18/2011. Manner of Service: ECF/NDA. [09-1201, 09-1202]
4/25/2011	[9860932] Order filed by Judges Kelly, Seymour and Lucero denying petition for rehearing en banc filed by Appellants Virgil D. "Gus" Reichle, Jr. and Dan Doyle. [09-1201, 09-1202]
07/19/2011	[9885893] Order filed by Judges Kelly, Seymour and Lucero granting motion to continue stay of mandate until 08/25/2011. Served on 07/19/2011, [09-1201, 09-1202]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-01964-WYD-CBS

STEVEN HOWARDS,

Plaintiff,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity; KRISTOPHER MISCHLONEY, in his individual and official capacity; DANIEL MCLAUGHLIN, in his individual and official capacity; DAN DOYLE, in his individual and official capacity; ADAM DANIELS, in his individual and official capacity,

Defendants.

AMENDED COMPLAINT

(Filed May 28, 2007)

Plaintiff STEVEN HOWARDS, by and through his attorney, David A. Lane, of KILLMER, LANE & NEWMAN, LLP, respectfully alleges for his Complaint as follows:

INTRODUCTION

1. This is an action for damages against the Defendants for violating Plaintiff Steven Howards's rights under the First and Fourth Amendments of the Constitution. Mr. Howards alleges that Defendants violated his Fourth Amendment rights when,

intentionally, knowingly, recklessly, and with deliberate indifference to his constitutional rights, they subjected him to an intrusive, unjustified, and illegal search and seizure without any basis for believing he was engaged in criminal activity. Mr. Howards additionally alleges that Defendants violated his First Amendment rights when they retaliated against him by arresting him for his valid exercise of his free speech rights. Defendants' conduct under color of state law proximately caused the deprivation of Mr. Howards's federally protected rights.

JURISDICTION & VENUE

2. This action arises under the Constitution and laws of the United States, including Article III, Section 1 of the United States Constitution and 42 U.S.C. § 1983. If this Court finds that the Defendant was acting under color of federal law instead of state law pursuant to 42 U.S.C. § 1983 (because the Defendant is a federal law enforcement agent), it should then be found under *Bivens v. Six Unknown Drug Agents*, 403 U.S. 388 (1971). Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331, 1343 and 2201. Jurisdiction supporting Mr. Howards' claim for attorney fees is conferred by 42 U.S.C. § 1988.

3. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391(b). All of the events alleged herein occurred within the state of Colorado, and all of the parties are residents of the state. At all pertinent times mentioned herein, Defendants were

employed by the United States Treasury Department as a Secret Service agent assigned to protect the Vice President of the United States, Dick Cheney, and were acting under color of federal and state law at the time of this incident.

PARTIES

4. At all pertinent times mentioned herein, Plaintiff Steve Howards was a citizen of the United States of America and a resident of Colorado.

5. At all pertinent times mentioned herein, Defendants were employed as a Secret Service agents and were acting officially and individually within the scope of their duties and employment, under color and authority of state and federal law, and in their official capacities as a United States Treasury Department employees.

FACTUAL BACKGROUND

6. On June 16, 2006, Vice President Dick Cheney was in Beaver Creek, Colorado, as was Plaintiff, Steven Howards.

7. Mr. Howards was walking in Beaver Creek with his young son who was going to a piano lesson, when he saw Mr. Cheney surrounded by people, shaking hands and posing for photographs in an outdoor mall area.

8. Mr. Howards and his son walked to where Mr. Cheney was standing and Mr. Howards, who was approximately 2-3 feet away from Mr. Cheney addressed the Vice President by saying "I think your policies in Iraq are reprehensible" or words to that effect.

9. Mr. Howards and his young son then walked away to go to the piano lesson where he joined his wife and his other young son.

10. This encounter with the Vice President occurred in plain view of dozens of citizens and numerous Secret Service agents including all Defendants except Reichle.

11. Approximately five to ten minutes later Mr. Howards and his other son began to return through the same area.

12. As Mr. Howards and his son approached the area where the initial encounter occurred, they were intercepted by the Defendants who asked Mr. Howards if he had assaulted the Vice President.

13. Mr. Howards, in shocked amazement, denied that he had assaulted the Vice President.

14. Defendant SA Kristopher Mischloney was an eye witness to the incident therefore he knew there was no probable cause to believe any offense had been committed however he grabbed Steven Howards' arm nevertheless and assisted in the arrest.

15. Defendant SA Daniel McLaughlin also assisted in arresting Steven Howards and was an eye witness to the incident described above thereby putting him on notice that there was no probable cause to believe any offense had been committed.

16. Defendant SA Dan Doyle was an eye witness to the incident therefore he knew there was no probable cause to believe any offense had been committed and he grabbed Steven Howards' arm in assisting in the arrest.

17. Defendant SA Adam Daniels was an eye witness to the incident therefore he knew there was no probable cause to believe any offense had been committed and he grabbed Steven Howards' arm in assisting in the arrest.

18. At that point, Mr. Howards, in the presence of his young son, was placed in handcuffs and taken to the Eagle County jail where he was searched and detained for several hours.

19. Although the Defendants told Mr. Howards that he was going to be charged with assaulting the vice-president, the Defendants instructed the Eagle County, Colorado Sheriff's Department to issue Mr. Howards a summons for harassment under Colorado State Law, for harassing the Vice President.

20. On July 6, 2006, the Eagle County District Attorney's office moved to dismiss all charges.

21. On July 10, 2006, the state court dismissed all charges.

22. At no time during these encounters did Steven Howards ever violate any law, federal, state or local.

23. Mr. Howards was arrested without probable cause to believe that he had committed any offense whatsoever.

24. Mr. Howards was arrested in retaliation for his having exercised his First Amendment protected free speech right to speak out to the Vice President and in retaliation for his having exercised his First Amendment right to petition his government.

FIRST CLAIM FOR RELIEF
(§ 1983 Fourth Amendment Violation – Unlawful Seizure – all Defendants)

25. Mr. Howards incorporates all other paragraphs of this Complaint for purposes of this claim.

26. The actions of Defendants as described herein, while acting under color of state and/or federal law, intentionally deprived Mr. Howards of the securities, rights, privileges, liberties, and immunities secured by the Constitution of the United States of America, including his right to freedom from unlawful seizure as guaranteed by the Fourth Amendment to the Constitution of the United States of America and 42 U.S.C. §1983 in that Steve Howards was arrested without probable cause to believe he had committed any offense.

27. Defendants intentionally, knowingly, recklessly, and excessively subdued, restrained, detained and falsely arrested Mr. Howards, without any reasonable justification or probable cause.

28. Defendants' conduct proximately caused significant injuries, damages, and losses to Mr. Howards.

SECOND CLAIM FOR RELIEF
(§ 1983 Fourth Amendment Violation – Unlawful Search – all Defendants)

29. Mr. Howards incorporates all other paragraphs of this Complaint for purposes of this claim.

30. The actions of Defendants as described herein, while acting under color of state and/or federal law, intentionally deprived Mr. Howards of the securities, rights, privileges, liberties, and immunities secured by the Constitution of the United States of America, including his right to freedom from unlawful searches as guaranteed by the Fourth Amendment to the Constitution of the United States of America and 42 U.S.C. §1983, in that the Defendants had no probable cause or reasonable suspicion to believe that Steven Howards had committed any violation of the law prior to searching his person pursuant to the unlawful arrest.

31. Defendants deliberately and improperly accosted Mr. Howards and intentionally, knowingly, and recklessly subjected him to an illegal, demeaning,

and invasive search without any reasonable justification.

32. Defendants' conduct proximately caused damages to Mr. Howards.

THIRD CLAIM FOR RELIEF
(§ 1983 First Amendment Violation –
Retaliation for Exercise of Free Speech
All Defendants)

33. Mr. Howards incorporates all other paragraphs of this Amended Complaint for purposes of this claim.

34. In criticizing the actions of the Vice President and the Bush administration in pursuing the war in Iraq, Mr. Howards was engaging in the constitutionally protected activity of free speech and petitioning his government for redress.

35. Mr. Howards's speech was related to matters of public concern.

36. The Defendants' acts of intimidating, threatening, searching, and falsely arresting Mr. Howards were motivated by Mr. Howards's exercise of constitutionally protected conduct.

37. Defendants' actions caused Mr. Howards to suffer injuries that would chill a person of ordinary firmness from continuing to engage in such constitutionally protected activity.

38. Defendants' conduct violated clearly established rights belonging to Mr. Howards of which reasonable persons in Defendants' position knew or should have known.

39. Defendants' acts were done under color of state and/or federal law.

40. Defendants' engaged in the conduct described by this Complaint intentionally, knowingly, willfully, wantonly maliciously, and in reckless disregard of Mr. Howards's federally protected constitutional rights.

41. Defendants' conduct proximately caused significant injuries, damages and losses to Mr. Howards.

WHEREFORE, Mr. Howards respectfully requests that this Court enter judgment in his favor and against the Defendants, and grant:

(a) Appropriate declaratory and other injunctive and/or equitable relief;

(b) Compensatory and consequential damages, including damages for emotional distress, loss of reputation, humiliation, loss of enjoyment of life, and other pain and suffering on all claims allowed by law in an amount to be determined at trial;

(c) All economic losses on all claims allowed by law;

(d) Punitive damages on all claims allowed by law and in an amount to be determined at trial;

(e) Attorneys fees and the costs associated with this action, including those associated with having to defend against the false criminal charge as well as expert witness fees, on all claims allowed by law;

(f) Pre- and post-judgment interest at the lawful rate.

(g) Any further relief that this court deems just and proper, and any other relief as allowed by law.

PLAINTIFF REQUESTS A TRIAL TO A JURY ON ALL ISSUES SO TRIABLE.

Dated this 29th day of May, 2007.

KILLMER, LANE & NEWMAN, LLP

s/ David A. Lane

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Attorneys for Plaintiff

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-01964-WYD-CBS

STEVEN HOWARDS,

Plaintiff,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity; KRISTOPHER MISCHLONEY, in his individual and official capacity; DANIEL MCLAUGHLIN, in his individual and official capacity; DAN DOYLE, in his individual and official capacity; ADAM DANIELS, in his individual and official capacity;

Defendants.

ANSWER TO SECOND AMENDED COMPLAINT

Defendant, Virgil D. "Gus" Reichle, Jr. ("Reichle"), by and through his counsel, Hogan & Hartson L.L.P., respectfully submits this Answer to Plaintiff Steven Howards' Second Amended Complaint ("Complaint").

INTRODUCTION

1. Reichle generally denies each and every allegation contained in the Complaint to the extent that such allegations are not specifically admitted herein, and further denies that Plaintiff is entitled to any relief in connection with his Complaint. The allegations contained in paragraph 1 of the Complaint are

not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 1 of the Complaint.

JURISDICTION & VENUE

2. Reichle admits that this Court has jurisdiction over this case pursuant to Bivens v. Six Unknown Drug Agents, 403 U.S. 388 (1971), and 28 U.S.C. § 1331. Reichle denies the remaining allegations contained in paragraph 2 of the Complaint.

3. Reichle admits that venue is proper in this district because the events alleged in the Complaint occurred within the State of Colorado and because the parties are residents of Colorado. Reichle admits that he was assigned to protect the Vice President of the United States and was acting under color of federal law at the time of the incident. Reichle denies the remaining allegations contained in paragraph 3 of the Complaint.

PARTIES

4. Reichle admits the allegations contained in paragraph 4 of the Complaint.

5. Reichle admits that at all times pertinent to this action, he was employed by the United States Department of Homeland Security as a Secret Service agent, and acted in his official capacity, within the

scope of his employment/agency, and under color of federal law. Reichle denies the remaining allegations contained in paragraph 5 of the Complaint.

FACTUAL BACKGROUND

6. Reichle admits the allegations contained in paragraph 6 of the Complaint.

7. Reichle lacks sufficient information to admit or deny the allegations contained in paragraph 7 of the Complaint.

8. Reichle lacks sufficient information to admit or deny the allegations contained in paragraph 8 of the Complaint.

9. Reichle lacks sufficient information to admit or deny the allegations contained in paragraph 9 of the Complaint.

10. Reichle admits that Plaintiff's encounter with the Vice President did not occur within the plain view of Reichle. Reichle lacks sufficient information to admit or deny the remaining allegations contained in paragraph 10 of the Complaint.

11. Reichle lacks sufficient information to admit or deny the allegations contained in paragraph 11 of the Complaint.

12. Reichle admits that while acting in his official capacity as a Secret Service agent, he was advised by multiple reliable sources also assigned

to protect the Vice President that Plaintiff had physically assaulted the Vice President. Reichle admits that based upon that reliable information, he had a reasonable belief that Plaintiff committed a crime and he therefore arrested Plaintiff with probable cause for assault. Reichle further admits that when he questioned Plaintiff, Plaintiff responded by stating "fuck you, I don't have to talk to you, and won't talk to you," or words to that effect. Reichle denies the remaining allegations contained in paragraph 12 of the Complaint.

13. Reichle lacks sufficient information to admit or deny the allegations contained in paragraph 13 of the Complaint.

14. Reichle admits that Defendant Mischloney assisted in arresting Plaintiff. Reichle lacks sufficient information to admit or deny the remaining allegations contained in paragraph 14 of the Complaint.

15. Reichle admits that Defendant McLaughlin advised Reichle that Plaintiff had physically assaulted the Vice President, and that Defendant McLaughlin assisted in arresting Plaintiff. Reichle lacks sufficient information to admit or deny the remaining allegations contained in paragraph 15 of the Complaint.

16. Reichle admits that Defendant Doyle advised Reichle that Plaintiff had physically assaulted the Vice President, and that Defendant Doyle assisted in arresting Plaintiff. Reichle lacks sufficient information to admit or deny the remaining allegations contained in paragraph 16 of the Complaint.

17. Reichle admits that Defendant Daniels advised Reichle that Plaintiff had physically assaulted the Vice President, and that Defendant Daniels assisted in arresting Plaintiff. Reichle lacks sufficient information to admit or deny the remaining allegations contained in paragraph 17 of the Complaint.

18. Reichle admits that Plaintiff was arrested, placed in handcuffs, and taken to the Eagle County jail. Reichle lacks sufficient information to admit or deny the remaining allegations contained in paragraph 18 of the Complaint.

19. Reichle admits that pursuant to the recommendation of the Eagle County Deputy District Attorney, Plaintiff was charged with Harassment under Colorado state law. Reichle denies the remaining allegations contained in paragraph 19 of the Complaint.

20. Reichle lacks sufficient information to admit or deny the allegations contained in paragraph 20 of the Complaint.

21. Reichle lacks sufficient information to admit or deny the allegations contained in paragraph 21 of the Complaint.

22. Reichle denies the allegations contained in paragraph 22 of the Complaint.

23. Reichle denies the allegations contained in paragraph 23 of the Complaint.

24. Reichle denies the allegations contained ir paragraph 24 of the Complaint.

FIRST CLAIM FOR RELIEF

25. Reichle incorporates the preceding para graphs as if set forth herein.

26. The allegations contained in paragraph 2(are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 26 of the Complaint.

27. The allegations contained in paragraph 27 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 27 of the Complaint.

28. The allegations contained in paragraph 28 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 28 of the Complaint.

SECOND CLAIM FOR RELIEF

29. Reichle incorporates the preceding para graphs as if set forth herein.

30. The allegations contained in paragraph 3(are not factual and do not require an answer. To the

extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 30 of the Complaint.

31. The allegations contained in paragraph 31 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 31 of the Complaint.

32. The allegations contained in paragraph 32 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 32 of the Complaint.

THIRD CLAIM FOR RELIEF

33. Reichle incorporates the preceding paragraphs as if set forth herein.

34. The allegations contained in paragraph 34 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 34 of the Complaint.

35. The allegations contained in paragraph 35 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle

denies the factual allegations contained in paragraph 35 of the Complaint.

36. The allegations contained in paragraph 36 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 36 of the Complaint.

37. The allegations contained in paragraph 37 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 37 of the Complaint.

38. The allegations contained in paragraph 38 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 38 of the Complaint.

39. The allegations contained in paragraph 39 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 39 of the Complaint.

40. The allegations contained in paragraph 40 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 40 of the Complaint.

41. The allegations contained in paragraph 41 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Reichle denies the factual allegations contained in paragraph 41 of the Complaint.

AFFIRMATIVE DEFENSES

1. Plaintiff's claims are barred by Reichle's qualified immunity.

2. Plaintiff's claims fail to state claims upon which relief may be granted.

3. Plaintiff's claims are barred, in whole or in part, by unclean hands.

4. Plaintiff's claims are barred, in whole or in part, by the doctrines of laches, waiver, estoppel and release.

5. Reichle reserves the right to assert any additional affirmative defenses or to withdraw one or more of the defenses set forth above as appropriate after further investigation and discovery.

WHEREFORE, Reichle respectfully requests this Court to enter judgment in his favor on the claims asserted against him, to award costs, expenses and attorneys' fees, and for such further relief as this Court deems just and proper.

Respectfully submitted this 19th day of June 2007.

HOGAN & HARTSON L.L.P.

s/ Dugan Bliss

Sean R. Gallagher
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ATTORNEYS FOR DEFENDANT VIRGIL D. "GUS" REICHLE, JR.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-01964-WYD-CBS

STEVEN HOWARDS,

Plaintiff,

v.

VIRGIL D. "GUS" DEFENDANTS, JR., in his individual and official capacity; KRISTOPHER MISCHLONEY, in his individual and official capacity; DANIEL MCLAUGHLIN, in his individual and official capacity; DAN DOYLE, in his individual and official capacity; ADAM DANIELS, in his individual and official capacity,

Defendants.

DEFENDANTS DOYLE AND MISCHLONEY'S ANSWER TO SECOND AMENDED COMPLAINT

Defendants Kristopher Mischloney and Dan Doyle ("Defendants"), in their individual capacities, and by and through their counsel, Hogan & Hartson LLP, respectfully submit their Answer to Plaintiff Steven Howards' Second Amended Complaint ("Complaint").

INTRODUCTION

1. Defendants generally deny each and every allegation contained in the Complaint to the extent that such allegations are not specifically admitted

herein, and further deny that Plaintiff is entitled to any relief in connection with his Complaint. The allegations contained in paragraph 1 of the Complaint are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 1 of the Complaint.

JURISDICTION & VENUE

2. Defendants admit that this Court has jurisdiction over this case pursuant to Bivens v. Six Unknown Drug Agents, 403 U.S. 388 (1971), and 28 U.S.C. § 1331. Defendants deny the remaining allegations contained in paragraph 2 of the Complaint.

3. Defendants admit that venue is proper in this district because the events alleged in the Complaint occurred within the State of Colorado and because the parties are residents of Colorado. Defendants admit that they were assigned to protect the Vice President of the United States and were acting under color of federal law at the time of the incident. Defendants deny the remaining allegations contained in paragraph 3 of the Complaint.

PARTIES

4. Defendants admit the allegations contained in paragraph 4 of the Complaint.

5. Defendants admit that at all times pertinent to this action, they were employed by the United

States Department of Homeland Security as Secret Service agents, and acted in their official capacity, within the scope of their employment/agency, and under color of federal law. Defendants deny the remaining allegations contained in paragraph 5 of the Complaint.

FACTUAL BACKGROUND

6. Defendants admit the allegations contained in paragraph 6 of the Complaint.

7. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 7 of the Complaint.

8. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 8 of the Complaint.

9. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 9 of the Complaint.

10. Defendant Doyle admits that the incident occurred within his view. Defendant Mischloney denies that he saw the incident. Defendants lack sufficient information concerning the remaining allegations contained in paragraph 10 of the Complaint., and therefore deny the same.

11. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 11 of the Complaint.

12. Defendants admit that SA Reichle ap proached Plaintiff and asked to speak to him. Plain tiff became belligerent, stated "fuck you, I don't hav to talk to you, and won't talk to you," or words to tha effect, and walked away from SA Reichle and S Mischloney. Defendants deny the remaining allega tions contained in paragraph 12 of the Complaint.

13. Defendants lack sufficient information t admit or deny the allegations contained in paragrap 13 of the Complaint.

14. Defendants deny the allegations of para graph 14 of the Complaint.

15. Defendants admit that Defendar McLaughlin advised Defendants that Plaintiff ha physically assaulted the Vice President, and tha Defendant McLaughlin assisted in arresting Plaintif Defendants deny the remaining allegations containe in paragraph 15 of the Complaint.

16. Defendants admit that Defendant Doyl advised Defendants that Plaintiff had physicall assaulted the Vice President, and that Defendar Doyle assisted in arresting Plaintiff. Defendants den the remaining allegations contained in paragraph 1 of the Complaint.

17. Defendants admit that Defendant Daniel advised Defendants that Plaintiff had physicall assaulted the Vice President, and that Defendar Daniels assisted in arresting Plaintiff. Defendant lack sufficient information to admit or deny th

remaining allegations contained in paragraph 17 of the Complaint.

18. Defendants admit that Plaintiff was arrested, placed in handcuffs, and taken to the Eagle County jail. Defendants lack sufficient information to admit or deny the remaining allegations contained in paragraph 18 of the Complaint.

19. Defendants admit that pursuant to the recommendation of the Eagle County Deputy District Attorney, Plaintiff was charged with Harassment under Colorado state law. Defendants deny the remaining allegations contained in paragraph 19 of the Complaint.

20. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 20 of the Complaint.

21. Defendants lack sufficient information to admit or deny the allegations contained in paragraph 21 of the Complaint.

22. Defendants deny the allegations contained in paragraph 22 of the Complaint.

23. Defendants deny the allegations contained in paragraph 23 of the Complaint.

24. Defendants deny the allegations contained in paragraph 24 of the Complaint.

FIRST CLAIM FOR RELIEF

25. Defendants incorporates the preceding paragraphs as if set forth herein.

26. The allegations contained in paragraph 26 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 26 of the Complaint.

27. The allegations contained in paragraph 27 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 27 of the Complaint.

28. The allegations contained in paragraph 28 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 28 of the Complaint.

SECOND CLAIM FOR RELIEF

29. Defendants incorporates the preceding paragraphs as if set forth herein.

30. The allegations contained in paragraph 30 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 30 of the Complaint.

31. The allegations contained in paragraph 31 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 31 of the Complaint.

32. The allegations contained in paragraph 32 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 32 of the Complaint.

THIRD CLAIM FOR RELIEF

33. Defendants incorporates the preceding paragraphs as if set forth herein.

34. The allegations contained in paragraph 34 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 34 of the Complaint.

35. The allegations contained in paragraph 35 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 35 of the Complaint.

36. The allegations contained in paragraph 36 are not factual and do not require an answer. To the extent that an answer is deemed appropriate,

Defendants deny the factual allegations contained in paragraph 36 of the Complaint.

37. The allegations contained in paragraph 37 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 37 of the Complaint.

38. The allegations contained in paragraph 38 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 38 of the Complaint.

39. The allegations contained in paragraph 39 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 39 of the Complaint.

40. The allegations contained in paragraph 40 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 40 of the Complaint.

41. The allegations contained in paragraph 41 are not factual and do not require an answer. To the extent that an answer is deemed appropriate, Defendants deny the factual allegations contained in paragraph 41 of the Complaint.

AFFIRMATIVE DEFENSES

1. Plaintiff's claims are barred by Defendants' qualified immunity.

2. Plaintiff's claims fail to state claims upon which relief may be granted.

3. Plaintiff's claims are barred, in whole or in part, by unclean hands.

4. Plaintiff's claims are barred, in whole or in part, by the doctrines of laches, waiver, estoppel and release.

5. Defendants reserves the right to assert any additional affirmative defenses or to withdraw one or more of the defenses set forth above as appropriate after further investigation and discovery.

WHEREFORE, Defendants Mischloney and Doyle respectfully request this Court enter judgment in their favor on the claims asserted against them, to award costs, expenses and attorneys' fees, and for such further relief as this Court deems just and proper.

Respectfully submitted this 7th day of September, 2007.

HOGAN & HARTSON LLP

s/ Sean R. Gallagher

Sean R. Gallagher
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ATTORNEYS FOR DEFENDANTS VIRGIL D. "GUS" REICHLE, JR., KRISTOPHER MISCHLONEY, and DAN DOYLE

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEVEN HOWARDS, Plaintiff, v VIRGIL D. "GUS" REICHLE, JR., KRISTOPHER MISCHLONEY, DANIEL MCLAUGHLIN, DAN DOYLE, ADAM DANIELS, Individually and in Their Official Capacity. Defendants.	:	CASE NO: 06-CV-01964-WYD-CBS

CONFIDENTIAL

Washington, D.C.

Tuesday, November 27, 2007

Deposition of:

VIRGIL REICHLE, JR.

called for oral examination by counsel for Plaintiff, pursuant to Notice, at the Law Offices of Hogan & Hartson, 555 13th Street, Northwest, 12th Floor, Washington, D.C., before Mary E. Warner of Capital Reporting, sworn by a Notary Public in and for the District of Columbia, beginning at 1:01 p.m.

* * *

[10] A No.

Q When you – when you were designated the person to go out and do the interview, how far physically from the scene were you when you got that notice?

A Approximately 75 to 100 yards.

Q Okay. What were you told the reason for the interview was?

A I was told via radio that there's been an incident involving Vice President Cheney and I need to respond just south of the ice skating rink adjacent to the escalators near the ski shop.

Q Okay. When you were told there was an incident involving Vice President Cheney, what – what were you told?

A That was it.

Q Who told you that?

A The dispatcher –

Q All right.

A – via the security room.

Q Well, that – that covers a lot of territory, doesn't it, the term "there was an [11] incident." That could mean a bomb blew up five feet away from him or who knows what, right?

A Yes.

Q So didn't you – didn't you ask somebody for more info on that what that meant?

A Yes.

Q Who did you ask?

A I didn't ask.

Q You just went?

A I just went.

Q Were you the only person dispatched from – as a result of this incident?

A We have a counterpart system. We only had one intelligence division team that's composed of a Secret Service agent and in this case a sheriff's deputy from the Eagle County Sheriff's Office, so, in essence, I was the only one that responded because my counterpart was actually waiting in line for a photograph opportunity with Vice President Cheney. So I responded alone.

Q The deputy sheriff?

A Yes.

[12] Q Okay. And do you recall the name of that deputy sheriff?

A Doug Winter.

Q Okay. And he's ultimately – I want you to take a look at that binder in front of you there. Look at Exhibit 1. Do you see it?

A Yes.

Q Are you familiar with that document?

A Yes.

Q And that's prepared by Doug Winters, is that correct?

A Yes.

Q And he filled out the summons and complaint against Steve Howards alleging that he had harassed the Vice President of the United States, is that correct?

A Yes.

Q Okay. So he was waiting downstairs already to get a picture of the Vice President, and you were up in the radio room, is that right?

A No.

Q Where were you?

[13] A I was organizing all the police photos. I was taking down their name and mailing address so that once the photographs are mailed to the Denver field office, I know where to actually mail the photographs on to.

Q Okay. So that was all happening when you got a call that there was an incident. Did you feel that – I mean, on a – this wasn't like – presumably you knew that it wasn't some catastrophic incident that had just occurred, didn't you. Somehow you knew

that, you know, while they needed you over there, it was just to do an interview, it wasn't to help out in a gun battle or anything else, right?

A Yes.

Q I mean, you had some information?

A Yes.

Q What was the information that you had?

A Very little. Only – as I've stated previously, I needed to respond to an area south of the ice skating rink adjacent to the escalators near the ski shop in an incident that involved [14] Vice President Cheney. That is all the information that I had to go on.

Q Okay. So you went the 75 to 100 yards to the designated location, is that correct?

A Yes.

Q And what – what happened there?

A Well, I encountered various personnel from the Vice President's detail who are very alarmed and concerned about something that had transpired.

Q Okay. Who in particular did you encounter?

A The first person I encountered was Special Agent Oscar Rosalis.

Q And what did Oscar Rosalis tell you?

A He said that there is – there's been an incident involving the Vice President. There's a protective

intelligence subject that needs to be interviewed, and then pointed in the general location of the escalators as to where this person could be located.

Q When you say there's a "protective [15] intelligence problem," what does that mean?

A This could be a lot of things. In this case, in this situation, I didn't specifically know what. I just knew that presumably there's been a violation of law of some sort. There's been a violation because typically you do not call an intelligence agent unless there's been a violation of law. It's like picking up the phone and dialing 9-1-1.

Q Okay. We've got to backtrack a little, because you're telling me that intelligence agents respond to violations of law, special agents are there to protect, but your job is essentially the same as their job is what I've heard you say, so correct –

A No.

Q Fill me in on this. Explain to me how your job differs from Daniels' and McLaughlin's job?

A You must understand everything in the Secret Service is extremely compartmentalized.

MR. GILLIGAN: Can – can I just – [16] before the witness answers, caution him against revealing any sensitive security techniques or protective methodology.

BY MR. LANE:

Q I'm not – I don't – I don't – I'm not asking you to tell me anything along those lines. I just want to know the nature of your job as opposed to the nature of their jobs. And their jobs are – you know, everybody in the public world generally understands their job. Your job I don't understand, so –

A Individual missions are really task-oriented. And as I said, it's very compartmentalized. As a protective intelligence working group, my main function is to go out and interview people that have committed a violation of law. It could be something so benign as someone making a veiled threat such as, "I think somebody should kill the Vice President." That's just an example.

Q Okay. Did you hear from Rosalis what the violation of law was?

[17] A No.

Q Okay. I mean, isn't that important before you question someone that you have some idea, some intelligence of your own as to what it is you're – you're interviewing someone about?

A I believe it could have been helpful, but I felt that extenuating circumstances existed, and I didn't want to carry on a long discourse with Oscar Rosalis.

Q Well, I mean, when did you get some inkling of what had happened?

A It wasn't until after I had talked to Agent Doyle. He was actually the fourth person from the US Secret Service before I had any idea as to what was going on here.

Q Okay. Let's slow down then. Okay. Rosalis tells you there's a guy over there basically that you need to talk to. He points generically over in the escalator direction, is that right?

A Yes.

Q Okay. Did you know who he was referring [18] to?

A No.

Q Okay. Did you question him further about, "What are you talking about Rosalis?"

A No.

Q Okay. What happened then?

A I took another 10 to 15 steps and I run into Special Agent Ted Colshorn who was the lead advance agent for the Vice President's detail.

Q Okay. And what did he say?

A Ted Colshorn obviously very alarmed and concerned about something that had transpired indicated that there's a protective intelligence subject that needed to be interviewed, point – once again pointed off in the general direction of the escalators

but also indicated that the subject is a white male wearing blue jeans, has a T-shirt and a ball cap.

Q Okay. Did he describe what color the T-shirt was?

A I believe he said green.

Q Okay. So what did you do then? Did you [19] ask him, "What's up?"

A No, I didn't.

Q Okay. What happened then?

A I took another 15 to 20 steps and I run into ASAIC Andy Wurst.

Q What happened then?

A Once again, the supervisor, obviously very alarm and concerned about something that had transpired, asked me where my counterpart was.

Q Meaning Mr. Winters from the Eagle County Sheriff's Department?

A Yes.

Q What did you say?

A I said, "Deputy Winters is with the other police officers from the Colorado State Patrol and waiting in line for his photo opportunity with Vice President Cheney."

Q Okay. What happened then?

A Walked towards the escalators, and I –

Q Hang on. Let me – let me just stop you. Okay. Colshorn – excuse me. Wurst asks you, "Where's your counterpart?" You tell him, but did [20] you ask Wurst, like, "What's up, man?"

A No.

Q Why not?

A Once again, I felt that extenuating circumstances existed and I wanted to try to at least make eye contact with where this protective intelligence subject was.

Q Okay. So then what happens?

A I walked towards the escalators, and I make eye contact with Special Agent Doyle.

Q Okay.

A And Doyle basically pointed in the general direction of Mr. Howards, identified the protective intelligence subject that was, in fact, wearing a ball cap, blue jeans, T-shirt, carrying a bag.

Q Okay. What happened then?

A Agent Doyle gave me a quick thumbnail sketch that he had overheard the subject on a cellular telephone whom stated, "I'm going to ask him how many kids he's killed today." It was just assumed that he was talking about Cheney.

[21] I didn't ask anything further. At that point I pull out my credentials and approach Mr. Howards,

identify myself as a US Secret Service agent just asking if I could speak to him for a few minutes.

Q Okay. And what did he say?

A Mr. Howards, extremely belligerent, acting quite bizarre, might I add, shook his finger in my face, told me that I'm violating his rights and walked off.

Q Okay.

A So once again, I asserted myself, "Sir, I really just need to talk to you, this is no big deal. I just want to talk to you."

Q Okay. So what happened?

A Has a few expletives for me.

Q What did he say?

A "Fuck you, I don't have to talk to you and I'm not going to talk to you," and walks away.

So at that point I'm looking over my left shoulder, I'm looking over my right shoulder. Dan Doyle is there along with the two counter

* * *

[34] and McLaughlin and they basically said, "Yes, I saw it," after it was demonstrated on me.

Q So they say that – to you that they what Doyle did is accurate, his demo to you is accurate?

A Certainly that's my perception.

Q Okay. They didn't testify to that today, though, did they?

A I don't believe so.

Q Okay. Do you have any explanation for why they didn't testify to that today?

A No.

Q Okay. So what happened then?

A At that point I was – engaged Agent Doyle in a conversation. I said, based upon the totality of the circumstances, his premeditation, the conversation on the cell phone, the fact that Mr. Howards would not talk to me, the fact he's walking around with a bag in his hand in an unmagged area, and the fact that you're telling me that he had unsolicited contact, I had probable cause, so I decided to make an arrest and I went [35] after Mr. Howards.

Q What's an unmagged area?

A We did not have magnetometer support in that particular area – area because it was an off-the-record movement.

Q Okay. You believed you had probable cause to arrest Steve Howards for assaulting the Vice President, is that correct?

A Yes.

Q Okay. And you also understand that you need probable cause before you can make an arrest is that correct?

A Yes.

Q And you also understand that people have a right to approach the Vice President of the United States and say to him, "Your policies in Iraq are disgusting." You understand they have that right under the First Amendment, is that correct?

A Yes.

Q And you understand that if you arrested him in retaliation for having said that to the [36] Vice President, and that's the real reason you arrested him, you would be in violation of his First and Fourth Amendment rights?

MR. GALLAGHER: I'm going to object to the form of the question.

BY MR. LANE:

Q You can answer it.

A Yes. I believe that certainly would be wrong.

Q Now, did you ask – right now – I mean, you've given us the names of like five or six agents present that apparently saw what transpired there, correct? You've got Rosalis, Wurst, you've got Colshom, you've got McLaughlin, you've got Daniels, you've got Doyle, right? There are a lot of people there that saw what happened, right? A lot of agents?

MR. WESTFALL: I – I object to the form and I don't want to be cute about it. It's just I'm not sure that there's testimony that every one of those people saw it –

BY MR. LANE:

[37] Q Let me ask you – did they tell you they all had seen what happened?

MR. WESTFALL: – I don't think there's testimony on that.

THE WITNESS: No.

BY MR. LANE:

Q Okay. Did you believe it was going to be important to find out from agents who were actually within spitting distance of what happened to find out what happened?

A Yes.

Q Okay. Did you subsequently interview agents who were within, say, eight feet of what happened?

A I did my best to reach out to everyone that may have been an eyewitness.

Q Okay. Did you get corroboration from anyone that it went down the way Doyle told you it went down?

A Yes.

Q Who corroborated that?

A The White House photographer.

* * *

[46] Course or something to that effect, but I was there to support the Vice President once again in a protective intelligence capacity.

Q Okay. But let – let's go back now to in the meantime Steve Howards – you know, Doyle tells you and describes for you an assault that you demonstrated, right?

A Yes.

Q Based on Doyle's demo, you thought that that was an assault?

A Certainly.

Q I mean, because that was beyond merely, like, touching someone on the shoulder, right?

A Yes.

Q Had he – had you been informed that he simply touched him on the shoulder, you wouldn't believe that to be an assault, would you?

A Well, that, coupled with the fact that he approached Cheney with malice, even so much as a light touch, based upon the earlier conversation I'd say that would be an assault, too.

Q Okay. We can talk about that in a [47] minute. But –

A I mean, they weren't old high school football buddies, I think we can agree on that.

Q Right. But you also understand that incidental contact, no harm, no foul, okay? In life, that's generally true. When you – when you –

A It wasn't conveyed to me that this was incidental at all, it was willful and wanton.

Q And it was a – it was a blow more than a touch?

A Yes.

Q Okay. McLaughlin tells you there was no assault. Well, describe for me the conversation you had with him because you must have then said, "Look, you know, you saw what Doyle did and you said that's what happened and now you're telling me that's not what happened." Did you have a conversation to that effect?

A Yes.

Q Well, explain how that all went down.

A I asked him if someone was pressuring him [48] to change his testimony.

Q What did he say?

A He says "No."

I said, "Well, this isn't the rendition that I had heard three to four hours ago."

Q And what did he say?

A He hung up.

Q He just hung up on you?

A Hung up.

Q Okay. What did you do?

A Let me stand corrected. I did say one more thing. I told him that I want the original statement. And then he hung up the phone.

Q What's the source of all of this? Why – why all this conflict here?

A That would require speculation, and I'm not going to speculate.

Q Well, you know, in a deposition you're allowed to. And you – you would be able – for me, it would be complete speculation. You're an insider, give me your best guess –

MR. GALLAGHER: I'm going to object –

[49] BY MR. LANE:

Q – as to what's going on here.

MR. GALLAGHER: I'm going to object to the question on the grounds that he doesn't have the foundation to testify about this.

BY MR. LANE:

Q But you do have foundation because you're there and you've been an agent for how many years?

A Eight and a half.

Q Okay. So you know the inner workings, you know the politics, you know what's going on. What's it all about?

MR. GALLAGHER: Same objection.

BY MR. LANE:

Q He's objecting, but you can answer.

A Once again, this is mere speculation on my part.

Q Absolutely.

A First and foremost, they probably just don't want to inconvenience the Vice President. Certainly they don't want him to be bothered with a deposition.

[50] Perhaps Vice President Cheney just was willing to let it go, you know. He's a tough guy, played high school football. He could very well have been that, you know what, hey, a lot of people don't like me, oh well. And moved on. I don't know.

Q Okay. So he hangs up on you. Did you raise this issue with the Denver field office?

A Yes, I did.

Q And you raised this with Mr. Worthington?

A And Special Agent in Charge Lon Garner.

Q And what did they say – and when – first of all, when did you raise this with them?

A Approximately four to five hours after the initial event, so I'm going say approximately 6:00 p.m., 7:00 p.m. on June 16, 2007.

Q Did you do it in person or via telephone?

A Oh, in person, because at one point Lon Garner actually came to the Eagle County Sheriff's Office to get my – actually, excuse me, both him and Kevin Worthington came to the Eagle County Sheriff's Office to personally speak to me, and so [51] I conveyed essentially everything that I knew that had been conveyed to me.

Q Which is basically what you're telling us today?

A Yes.

Q Okay. What was their response?

A Certainly Lon Garner's response was, "Hey, I already talked to the special agent in charge of the detail, Mike Lee. Mike Lee says that he was a witness to it, but there was no assault, and it's – there was no assault."

Q Is Mike Lee part of the DC crew?

A He was the special agent in charge of the Vice President's detail at the time. He's now the special agent in charge of the Dallas field office.

Q Okay. So you – how many people were telling you at this point there was no assault?

A At that point I had two, Special Agent in Charge Lon Garner and Special Agent McLaughlin.

Q Smith told Garner there was no assault, or Smith told you there was no assault?

[52] A No. According to Garner, he had spoken with Special Agent in Charge Mike Lee face to face, and Mike Lee stated that he was there and, even though there was physical contact, Mike Lee didn't perceive it as an aggressive and threatening nature, and so therefore there was no assault.

Q You understand Steve Howards is saying he never assaulted him. He – he – he went up to him and said, "I just want you to know your policies in Iraq are disgusting," and then basically patted him on the shoulder and walked past?

A I – I understand that's what he's alleging.

Q Right. Under – you weren't an eyewitness. So let me ask you this. Given all the agents now saying there was no assault, there was no assault, Steve Howards saying there was no assault, what do you believe to be true?

A I believe there was an assault.

Q Okay. And that's based on the [53] photographer and – actually, the photographer says he saw him strike him sharply in the shoulder and caused his shoulder to move, but the other individual, the

personal aide, Mr. Dirkens, said he didn't see anything like that, he just – he even thought Steve Howards shook his hand?

A That's correct.

Q Okay. Why do you think there was an assault?

A Because I've known Special Agent Doyle for 12 years. I know him to be a man of incredible integrity. I trust this man with my life. I used to work with him on the road as a trooper in Colorado. I know Dan Doyle, I know what he's all about. Dan Doyle would never lie to me. He's never lied to me in the past. I've known Dan for 12 years. That coupled with the fact that a the White House photographer corroborated special Agent Doyle's rendition of events. The White House photographer, as far as I'm concerned, is a – is a great witness because he's a third party independent witness, he has no [54] reason to lie to me.

Q Okay. When Steve Howards got arrested, you hadn't spoken to him yet, right?

A Say this again.

Q You hadn't spoken to the photographer prior to arresting Steve Howards?

A No, I hadn't.

Q Your arrest was made on Doyle's statement about what happened, right?

A Yes.

Q And it was corroborated through the silence of McLaughlin and Daniels?

A I wouldn't say silence.

Q They – they affirmatively said, yeah, that's what happened?

A "Yes, I saw it." Well, I believe was the coop – the quote.

Q Doyle demoed it, these guys both said that they saw it?

A Yes.

Q Okay. They never took issue with Doyle's rendition of what happened?

[55] A No. At no point – you – you would think if it was some sort of misunderstanding, somebody would have tapped me on the shoulder and said, "Whoa, whoa, whoa, Gus, slow down. What you think happened isn't what happened." At no point did that happen.

Q Okay. Okay. So let's get back to the polygraph issue. So – so the – the question in your mind is was there an assault, wasn't there an assault? McLaughlin is hanging up the phone on you. Did you try to talk to anybody else?

A Yes, I did.

Q Who else did you try to talk to?

A One of my classmates from the academy – his name was Kevin Howell – he was actually working the shift that day. At some point – I'd say within 24 hours of this event happening, I said, "Kevin, what did you see? Did you see anything?" All Kevin was could tell me was that he didn't see anything but he heard something.

Q What did he hear?

A He heard a slap, a – a thud, a slap, a [56] sound.

Q Did you or anybody ever ask the Vice President, "Did some guy come up and hit you?"

A I was never allowed access to the Vice President.

Q Really?

A Never.

Q Would you agree with me that the Vice President may be able to resolve this factual dispute?

A Potentially.

Q I mean, as the victim of the slap or the touch or the shove or whatever it was, presumably he would be the one guy that would be able to shed some light on this whole factual issue?

A Possibly.

MR. GILLIGAN: Objection to the form.

THE WITNESS: Assuming he remembers it. I don't know. I can't speak for the Vice President.

BY MR. LANE:

[57] Q Sure. I understand that. But as a criminal investigator, a criminal investigator, Winters charged Howards with harassing the Vice President, right?

A Yes.

Q The Vice President is allegedly the victim of this harassment, right?

A Yes.

Q Have you ever in your entire career in law enforcement, which at least covers, what, eight years in the Secret Service and 12 years as a CSP?

A Five years as a state trooper.

Q Okay. Five years as a state trooper. Can you – other than a murder case, can you envision doing an investigation of a crime without talking to the victim? I mean, that's basic investigation 101?

A Well, yeah, I investigate a lot of vehicular assault cases where the victim unfortunately was in a coma.

Q All right. That's the equivalent of a

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[66] Q Okay. Did – well, you said that Lee talked to Cheney and said he wasn't assaulted?

A And this was hearsay from Lon Garner. Lon Garner is conveying this to me.

Q Okay. All right. Did Lon Garner tell you that Cheney's version of events jives more closely with Daniels' and McLaughlin's than it does with Doyle's?

A No.

Q Okay. If let – let me ask you this, now, okay? Part of your training is you understand that only – you can only arrest somebody with probable cause to believe they committed a crime, correct?

A Yes.

Q And if you have knowledge that a fellow officer is operating under a mistaken set of beliefs, that probable cause does exist – well, let me lay it out this way.

You're – you're an officer. You believe, given all the totality of circumstances, probable cause exists, all right? And you have [67] two fellow officers standing there who know that you're operating under a mistaken set of beliefs and that, no, this man is innocent, there is no probable cause, okay? Assume that.

Are the officers who are aware that there is no probable cause, are they duty bound or ethically obligated or by agency rule required to say something like, "Hey, Gus, no. This is not what's going on here. He didn't do what Doyle said he did," for example?

MR. WESTFALL: Object to the form.

MR. GALLAGHER: Objection to the form of the question.

You can answer it if you can.

THE WITNESS: Yes. Why would they want me to operate under false assumptions?

BY MR. LANE:

Q Okay. Who was present when you told Steve Howards, you are under arrest for assaulting the Vice President of the United States?

A I know for a fact that Agent Doyle was there. I – I believe McLaughlin and Daniels and [68] Mischloney were there as well.

Q Did McLaughlin, Daniels or Mischloney ever say to you, "Wait a minute, he didn't assault the Vice President of the United States"?

A No.

Q Had they said that, what course of action would you have taken?

MR. GALLAGHER: Objection, calls for speculation. You can answer it if you can.

THE WITNESS: If I was operating under a false set of assumptions and I'm getting indications that there's some sort of a – of a conflict of facts here, I'd have to put the brakes on it because then I wouldn't have probable cause. I've got to sort through

those facts before I can rationally make a decision as to whether I have probable cause.

BY MR. LANE:

Q Okay. Did – and McLaughlin I think you said flat out told you later there was no assault.

A Approximately three to four hours later, yes.

[69] Okay. So is it your presumption that McLaughlin at the time you were saying, "You're under arrest for assaulting the Vice President of the United States knew full well that Steve Howards had not assaulted the Vice President of the United States?

A I can't –

MR. GALLAGHER: Object, calls for speculation.

THE WITNESS: I can't speak for Agent McLaughlin.

BY MR. LANE:

Q Understood. But did you – when he said that, did ask him, "Well, McLaughlin, how come – where were you when I was putting the handcuffs on Steve Howards if there was no assault?"

MR. GALLAGHER: Can I just clarify. When – when he said what?

BY MR. LANE:

Q When McLaughlin said to you there was no assault did you ask him, "Hey, McLaughlin, why didn't you pipe up when I was putting the cuffs on

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[82] A Not necessarily.

Q The radio communication to you is somebody needs to be interviewed, right?

A Yes.

Q It was not somebody needs to be arrested, correct?

A That's correct.

Q All right. Because presumably if somebody needed to be arrested, other agents would be physically holding that person awaiting your arrival. Would you agree with that?

A I want you to understand not everybody had access to the same information. Those shift agents didn't know – weren't privy to the information that Mr. Howards was on a cell phone whom stated allegedly, "I'm going to go ask him how many kids he's killed today." That certainly is an important element. That proves that he approached Cheney with malicious intent.

Those shift agents didn't know that. They had no aware that that conversation took place. But that's a very important factor in my [83] decision of making a probably cause arrest.

Q Except do you know what he said to the Vice President when he did approach the Vice President?

A Do I – no. All – the only thing that I knew is that – what Agent Doyle had indicated to me – and I want to stand corrected on this earlier. Agent Doyle had indicated that Mr. Howards had uttered something to Vice President Cheney, all right? Essentially – he didn't know what was said, but he could hear some inaudible mumbling, okay?

Earlier I referred to that Agent Doyle heard something about Iraq. I want to stand corrected on that. All Agent Doyle heard is there was some sort of mumbling, so something was conveyed to Vice President Cheney.

Q Did Agent Doyle explain that to you during the break we just took?

A No. It was after the fact that I recalled this.

Q Okay. So Agent Doyle heard that – that [84] he was going to talk to Cheney about Iraq. Doyle heard Howards on Howards' cell phone saying, "I'm going to tell – ask Cheney how many kids he's killed today"?

A Yes.

Q He then sees Howards go over to the Vice President, touch the Vice President, somehow –

A Once again, you say "touched," I say "unsolicited physical contact that was perceived in an aggressive and threatening nature."

Q He says something and then he walks away?

A Something inaudible and walks away. But remains in the area, with a bag, in an area that's unmagged.

Q When you made contact with Mr. Howards, where was the Vice President?

A He was approximately – I'm going to guess maybe 50 feet away.

Q Okay. Was there some reason you couldn't get an agent to stop the Vice President and say, "Hey, I need to ask the Vice President what [85] happened? Was that just something that's not done?"

A That's just not protocol.

Q So part of the reason that you made a determination that you had probable cause is based on the content of the words that Steve Howards was heard talking into his cell phone about, correct?

A That established his frame of mind.

Q And that helped you – that was part of the probable cause you had to make an arrest, is what he said that he's going to go ask Cheney how many kids he's killed?

A Yes.

Q Okay. Other than – did you make any effort to figure out whether there were any truly independent civilian witnesses not associated with the Vice

President, not associated with the Secret Service, I'm talking about complete bystanders in the area?

A Hindsight being 20/20 I wish I would have had somebody to leave behind to talk to independent civilian witnesses, but I didn't have

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[90] disappointed at the Secret Service in general.

Q Why?

A Well, because I don't think we could have – I – I thought my request to conduct a polygraph examination of everyone involved was a reasonable request based upon, you know, what had transpired. I – I didn't feel that that was an unreasonable request.

Q Do you think this is a situation where the Secret Service simply would rather let the whole thing go rather than risk having some agents fail polygraphs?

MR. GALLAGHER: Object to the form of the question.

MR. WESTFALL: Object as well.

MR. GILLIGAN: Same objection.

BY MR. LANE:

Q Go ahead.

A I can't speculate on that. I don't know what the Secret Service is thinking.

Q Well, is this an ostrich-like move, they're just going to put their heads in the sand [91] rather than confront the – the possibility that – that somebody may be lying about something here?

MR. GALLAGHER: Same objection.

MR. GILLIGAN: Same objection.

MR. WESTFALL: Same objection.

BY MR. LANE:

Q Go ahead.

A I don't know.

Q I understand. But this goes back to where we were before. You've been in the Secret Service, I haven't. Is that your best reasonable surmise as a result of your experiences with Secret Service?

A It's possible.

Q Any other reasons that you can think of?

MR. GALLAGHER: Again, same objection.

MR. WESTFALL: Same objection.

MR. GILLIGAN: Same objection.

BY MR. LANE:

Q Go ahead.

A No.

[92] Q Okay. Let's go through some of these exhibits. Exhibit 1 is the summons and complaint issued by Deputy Winters. Did Winters see anything that happened there to your knowledge?

A At some point I think Mr. Howards had already had the handcuffs on when he actually made his approach, although I can't say that for sure. But somewhere to the point where I had made the decision to make a probable cause arrest to the point where Mr. Howards was handcuffed, Mr. Winters did show up.

Q If you – you had probable cause to believe that Steve Howards committed an assault to the Vice President, why did you turn him over to state custody? Why didn't you take him down to Denver and – and process him through federal custody?

A Well, because if I recall at the time I think it was Friday afternoon. We were 100 miles from downtown Denver. If I can't get a suspect to the marshals by 2:00 p.m., you know, he has to wait till the following day.

[93] With that in mind, I made a decision let's go ahead and transport him to the Eagle County Sheriff's Office. We can always file a state charge, which would give me sufficient opportunity to make numerous phone calls, one of those phone calls being the Assistant United States Attorney Jim Allison in Denver.

Q Understood. So without telling me what the conversation was with Mr. Allison, there came a time where you made a determination that federal charges were not going to be made, right?

A I didn't make that determination.

Q Okay. But the only charges you – you – you filed were through Winters, and they were state court harassment charges, is that right?

A That's not correct.

Q Did you file other charges?

A I – I did draft a complaint.

Q A federal complaint?

A Yes.

Q Okay.

A More than one.

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[110] Q All right. If your intent is simply to get the person's attention by touching them, without hitting them or assaulting them, simply get their attention – let me ask you, have you ever been in a crowd and you're trying to get somebody's attention and you go, "Excuse me," and you touch them on the shoulder?

A Yes, I have.

Q When you first made contact with Steve Howards did you touch him?

A No.

Q Okay.

A And I gave Mr. Howards an opportunity to explain his actions twice.

Q Okay. Let's go back to touching someone to get their attention. If Steve Howards' intent was to simply to touch the Vice President to get his attention and have the Vice President look at him and then tell him his policies are disgusting, do you believe he's in violation of any law?

MR. WESTFALL: Objection form.

MR. GALLAGHER: Same objection.

[111] THE WITNESS: Let me – let me preface this. Dan Doyle overheard Mr. Howards on the cell phone which indicated basically his frame of mind.

BY MR. LANE:

Q Which he thought the policies in Iraq were disgusting?

A That's correct, that's correct.

Q Okay.

A So therefore one could assume that he proceeded to walk up on Cheney with malice in heart.

Q Well, hang on. When you say malice in his heart, malice in his heart is different than, "You know what, I think Cheney is personally a great guy. I love Cheney but his policies are disgusting and it's American – official American policy. And I'm going to go up to this guy, and I'm going to tell him, 'What you're doing is disgusting.' And I'm going to tell him that," He's allowed to do that, isn't he?

A Certainly.

Q Even if it's going to annoy the Vice [112] President, right?

A As long as you don't touch him.

Q If you're touching him to get his attention and so he'll look at you and understand that, "Hey, I have a message to deliver to you. And my message is your policies are disgusting," that's not illegal, is it?

MR. GALLAGHER: Objection.

THE WITNESS: I believe it.

BY MR. LANE:

Q Okay. Fair enough. But if you want to go up to the president or the Vice President and do exactly the same kind of touching and say, "Hey, man, I think you are the greatest Vice President in the history of the United States of America. And I just want to thank you for the fine job you're doing," that's not illegal, is it?

A From that conversation I don't get the impression he's trying to annoy the Vice President.

Q Okay.

A He's offering him kudos.

[113] Q Right. Same touching, different message, different results, is that what you're saying?

A I believe so, yes.

Q Okay. And is that pursuant to your training from the Secret Service?

A Yes.

Q Okay. What was the bond that was set on Steve Howards?

A I believe it was $500.

Q How long was he in jail, do you know?

A Not very long. I'm going to say five or six hours approximately.

Q All right. Exhibit 9 is your report, is that correct?

A I think that's Doyle's.

Q This is Doyle's report? Oh, you're right, Special Agent Doyle. I apologize for that. Did Doyle tell you that when he was – when Steve Howards was talking to the Vice President about Iraq, that he was standing behind the Vice President? In other words, the way you came up and kind of shoved him from

behind in your demo [114] made it look like Steve Howards was behind the Vice President, right?

A The way it was conveyed to me he approached Vice President from Cheney's 5:00 position. And so – anywhere I'm going to say between the 4:00 and 5:00 position is when the physical contact was made.

Q Okay. But when all this talk about Iraq was happening, did Cheney have his back to Howards?

A I believe Cheney did certainly have his back to Mr. Howards because remember Mr. Howards allegedly approached Cheney from the 5:00 position. And then at some point I think Mr. Howards skirted around to Vice President Cheney's right side after the unsolicited physical contact.

Q Okay. So Exhibit 10 is your report, is that right?

A Yes.

Q What documents have you reviewed in anticipation of coming here today to have your [115] deposition taken?

A I reviewed my statement. And that's about it.

Q Did you read the complaint in this case filed by Steve Howards?

A Early on, yes, I did.

Q Okay. In your report, oh, halfway down the page you say, "At this point SA Doyle and SAs Dan McLaughlin and his counter surveillance unit partner SA A Daniels are standing next to me. I asked them to briefly explain to me what transpired. Doyle. McLaughlin and Daniels stated that the" – what PI subject?

A Yes.

Q "PI subject had a very brief one-sided verbal altercation with Cheney and with hands-on with Cheney that was perceived as an aggressive and threatening manner"?

A Yes, but hands-on was a quote.

Q Okay. Who said hands-on?

A I believe all three did.

Q Okay. "A verbal altercation with [116] Cheney." Did they – did they fill you in on the details of what that included?

A No, it was inaudible.

Q All right. And what Doyle then demonstrated for you would be an assault or battery by any legal definition according to what you wrote here, right?

A Yes.

Q All right. So you had decided to arrest him prior to ever contacting him, is that correct?

A No, not at all.

Q Well, you said –

A When I contacted him, I had no idea what this was all about, not a clue.

Q Oh, I see. Okay. You contacted him, then you got the information from the agents and then you decided to arrest him?

A Yes.

Q All right. How did he resist being restrained by handcuffs?

A Circled around on me, lifted his arm, as if to resist the handcuff from going on, very [117] tense. In that sort of situation you as a law enforcement officer you really want to be on guard because you don't want to get sucker punched.

Q Okay. Did you see a child on scene?

A Never did see a child.

Q Did you see his wife on scene?

A Yes, at one point I did see Ms. Andrews.

Q Okay. And when did that happen?

A It wasn't until Mr. Howards already had the handcuffs on.

Q Now you've heard Agent Daniels describe his wife as being right there when all of this was going on, right?

A I did not see her until after the handcuffs were on Mr. Howards.

Q Okay. If I told you your description matched his wife description's and Agent Daniels' description was different from yours or Mr. Howards' wife, would that surprise you at all?

MR. GALLAGHER: Object to the form.

MR. WESTFALL: Object to the form.

THE WITNESS: She could have been there

* * *

EXHIBIT B

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

STEVEN HOWARDS, Plaintiff, vs. VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity, et. ano., Defendants.	Case No. 06-CV-01964-WYD-CBS

Washington, D.C.

Friday, December 7, 2007

Videotaped Deposition of:

SPECIAL AGENT DANIEL DOYLE

called for oral examination by counsel for Plaintiff, pursuant to notice, at Hogan & Hartson, L.L.P., 555 13th Street, Northwest, Washington, D.C., before Shari R. Broussard, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at 8:14 a.m., when were present on behalf of the respective parties:

* * *

[6] BY MR. LANE:

Q Sir, could state your name and spell your name for the record, please.

A My name is Daniel Doyle, D-A-N-I-E-L, D-O-Y-L-E.

Q And how are you employed?

A With the United States – with the United States Secret Service.

Q And how long have you been so employed?

A Since July of 1999.

Q All right. Can you give me a little bit of background information about yourself?

A As far as the Secret Service goes, I started in the Denver Field Office, I was transferred to the Washington Field Office. I am now with the Technical Security Division.

Q Okay. How about law enforcement prior to the Secret Service?

A I was a Colorado State Trooper prior to this.

Q And you worked with Gus Reichle for how many years?

[7] A Two years.

Q Okay. How long were you a trooper in Colorado?

A Two years.

Q Prior to that?

A I was a school teacher.

Q Really? Where?

A I taught for a couple of trade unions and taught classes for OSHA.

Q Where was that?

A In Colorado.

Q Okay. Prior to that?

A I worked in a prison.

Q As a CO?

A As an instructor in Lyman Correctional Facility.

Q Okay. It's a small world. I just spent the last two days dealing with a case out of Lyman.

Prior to that?

A Prior to that I worked for quite a few large construction companies. I was a field engineer for these construction companies doing [8] some environmental consulting and some surveying and – and layout for them.

Q Okay. And your educational background?

A I graduated out of University of Colorado with a degree in environmental studies with an emphasis in engineering.

Q When was that?

A I think that was back around '94.

Somewhere in there.

Q Okay.

A And a minor in geology also.

Q Okay. You obviously know why we're here and you were present during the depositions that we've previously conducted in this case; is that correct?

A Correct.

Q Where are you currently assigned with the Secret Service?

A Technical Security Division.

Q Where is that physically?

A There's office – offices throughout Washington, D.C., but my physical office is in – [9] in Landover, Maryland.

Q Okay. And you traveled to Denver to witness the deposition of Steve Howards; is that correct?

A That is correct.

Q And his wife and his child; is that correct?

A Correct.

Q You were in Washington, D.C. for the prior depositions of Agents McLaughlin, Mischloney, Daniels and Reichle; is that correct?

A That's correct.

Q Well, let me just start right in then. You understand, don't you, that there seems to be a variation or a variance in the testimony of Agents McLaughlin – is it McLaughlin? Is that how it's pronounced? McLaughlin?

MR. GALLAGHER: Yeah.

MR. McLAUGHLIN: McLaughlin.

BY MR. LANE:

Q McLaughlin – McLaughlin and Daniel with that of Agent Reichle, right? Is that a fair

* * *

[42] BY MR. LANE:

Q Okay. Fair enough. I guess the videotape will tell all, won't it?

A And if you could replay it right here, then I'll say yes or no, but I –

Q Well, I can't.

A – don't recall the exact statements.

Q Okay. That's fine.

Is it your recollection that there were mutual allegations of criminal activity, Reichle was accusing McLaughlin and Daniel of criminal activity and Daniel and McLaughlin were accusing Reichle of criminal activity?

MR. GALLAGHER: Objection.

BY MR. LANE:

Q Do you recall that happening?

MR. WESTFALL: Objection. Form and characterization.

MR. GALLAGHER: Objection. Asked and answered.

MR. GILLIGAN: Join all the objections.

THE WITNESS: I recall the mutual [43] allegations.

BY MR. LANE:

Q Of criminal activity?

MR. WESTFALL: Objection. Form and characterization.

MR. GALLAGHER: Objection. Asked and answered.

MR. GILLIGAN: Join.

THE WITNESS: I don't have enough evidence to prove that there was criminal activity.

BY MR. LANE:

Q Did I ever ask you if you had enough evidence to prove there was criminal activity or not?

A You're asking me if it was criminal in nature –

Q No.

A – and I don't have enough evidence to prove that.

Q That's not what I'm asking you, so please just listen very carefully to this question. Do you recall mutual allegations – allegations of [44] criminal activity? Yes or no?

MR. GALLAGHER: Objection. You've asked this question about 12 different ways and he's tried to answer it.

MR. LANE: Well, he hasn't. He's been evasive and trying not to answer it, so now I'm – I'm asking it for the last time. All right?

MR. WESTFALL: Objection. Form and characterization.

BY MR. LANE:

Q Go ahead.

MR. GILLIGAN: Join.

THE WITNESS: In the way you phrased it, no.

BY MR. LANE:

Q Okay. All right. Well, let's focus now on the issue of Mr. Howards' conduct. Will you describe what you saw Mr. Howards do from the moment he first came to your attention through the entire incident? Just give me a narrative of what you saw.

A While in the courtyard, the Beaver Creek [45] Ski Resort, I noticed an individual, Mr. Howards, talking on his cell phone and walking quickly – quickly throughout the crowd. He was very anxious about something. And the first time I noticed him on his cell phone he was making statements like "He's right here. The Vice President is right here. I'm looking at him right here." And –

Q Let me just interrupt for a second if I may. How far from the Vice President were you when you first made this observation of Mr. Howards and how far was he from the Vice President?

A I would say approximately 15 yards, 20 yards.

Q Okay. All right. Continue.

A I'm sorry, I lost my train of thought.

Q You said, "He's right here. The Vice President is right here," and he was on his cell phone.

A Correct. And then I just thought he was an excited citizen to see the Vice President. And he kind of went into the crowd, jogged around a little bit quickly, and then he came back out and [46] he was still on his cell phone. And at that point I heard him say "I'm going to ask him how many kids he's killed today."

Q And what did you take that to mean?

A I took that to mean that there was a demeanor about him that wasn't healthy and that we need to keep an eye on him.

Q What wasn't healthy about his demeanor?

A Somebody that would actually physically go up to the Vice President and make that statement just, just wasn't quite right as far as – as far as his motions, his rapid movement throughout the crowd. He had a large bag with him. There was – there was just something that deemed that the Secret Service kind of needed to keep an eye on him.

Q Okay. What about the content of what he said, what was it about the content that disturbed you?

A It disturbed me that it showed that there was some type of malice possibly.

Q What did you take the statement "I'm [47] going to ask him how many kids he's killed today," what did you take that to mean?

A I took that to mean that possibly things could escalate a little bit further if his demeanor was of that – by stating – by making that statement.

Q No, but I'm – I'm not asking you about your Secret Service concerns. I'm asking you just when you heard those words, what did you understand them to mean?

A I understood them to mean that he's going to approach the Vice President and ask him how many kids he's going to kill today.

Q Well, if you had heard him say I'm going to approach the Vice President and congratulate him on his wildly successful career as Vice President, that carries one meaning, and I'm going to go ask the Vice President how many kids he's killed today has another meaning, right?

A Correct.

Q Okay. What do you mean – what did you understand the words "I'm going to ask him how many [48] kids he's killed today," what did you – what did you think that was referring to?

A I – I thought it was referring to the war in Iraq.

Q Okay. And did you take that as a statement by Mr. Howards that he was obviously against this administration's policy in Iraq because it's resulting in kids being killed?

A I don't know what his opinion is of the war.

Q Did you take this as a statement of support for the Vice President's policies in Iraq or a statement of criticism about the Vice President's policies in Iraq?

A I took it possibly as a criticism.

Q Okay. Why did you take it that way?

A Because of his – his words, first of all, and his physical actions.

Q Okay. What did you observe then or what did you do then?

A At that point when I heard the statement, I approached the two CSU agents and told [49] Mr. McLaughlin that I heard this individual – individual say that he's going to ask the Vice President how many kids he's killed today. And at that time three of us kept a surveillance on the individual.

Q And who are these three?

A Myself, Daniels and McLaughlin.

Q Okay. What happened then?

A I still noticed that he was acting very erratic within the crowd and he was moving around the crowd very quickly. And then – and then at that point he broke in a – in a fast walk towards the Vice President. At that time the Vice President had a couple kids standing in front of him. The Vice President was shaking their hands and taking some photographs with the crowd and Mr. Howard reached in in about the 3:00 o'clock position and abruptly slapped the Vice President on his right shoulder.

When he did slap the Vice President, the Vice President shoulder's did drop, it took the Vice President by surprise, and I saw Mr. Howards [50] make a statement. I don't know what statement he made to the Vice President.

At that time he peeled off of the Vice President rather abruptly and he still hung around the area where the Vice President was. And at that time the ID agent, Mr. Reichle, was notified.

Q When you say he peeled off from the Vice President, he didn't run away, did he?

A He – he moved away quickly. All his movements were very quick and erratic.

Q And how far – well, quick and erratic. What does erratic mean?

A He had no set line to follow. He was moving in and out of the crowd, was just very erratic in his movement.

Q Okay. When you say he was still hanging around in the area, how far from the Vice President did he move away?

A At his furtherest point I don't think he was any further than 20 yards away from the Vice President.

Q Okay. So you then – did you notify [51] Reichle?

A When the incident took place, I don't remember who notified. I possibly could have through the security room or notified him directly, but I remember that he was notified.

Q Okay. And Reichle then comes on scene?

A That's correct.

Q Did you see that happen? Did you see Reichle arrive?

A Yes, I did.

Q Were you monitoring the Vice President's movements at that time as well as Mr. Howards'?

A To the best of my ability, yes.

Q All right. What happened then?

A Mr. Reichle was approached by a couple of the Vice President detail agents. I don't know what the conversation was. Gus came up to me and asked what happened. I explained quickly what took place and demonstrated what took place.

Q Let me stop you right there. Were Daniel and McLaughlin standing there in close proximity while you were demoing for Reichle what happened?

[52] A I – I couldn't answer that. I don't know.

Q Okay.

A I knew they were in the area, but I don't know if they were –

Q Okay.

A – in that –

Q You heard Reichle testify that they were. Do you recall that?

A Their testimony?

Q Reichle testified at his depo that these guys, McLaughlin and Daniel, were there and saw you demo what you demoed.

MR. WESTFALL: Objection. Form and characterization.

THE WITNESS: If that's what his –

BY MR. LANE:

Q Do you remember that?

A Yes. I remember him stating that in his testimony.

Q Okay. And do you dispute that they were there or you just simply don't know?

[53] A I just don't know.

Q Okay. All right. So you did the demo for Reichle that you showed us with Mr. Gallagher's kind assistance earlier; is that correct?

A That's correct.

Q All right. What happened then?

A At that point we identified Mr. Howard to Mr. Reichle. Mr. Reichle approached Mr. Howard, identified himself.

Q Were you in proximity to all this? Is this your own observation?

A Yes, these are my own observations.

Q How close to you – how close to you was all this happening?

A Oh, probably within definitely 10 feet.

Q Okay.

A Mr. Reichle identified himself, I saw him show his credentials, and asked Mr. Howard if he would ask some questions – answer some questions for Mr. Reichle. I didn't hear his exact – exact response, but I knew he was very frustrated at that point and I did –

* * *

[58] Q Okay. Was he, in fact, allowed to go deliver his son to a piano lesson, pick up his other son and then come back before he was arrested?

A I don't recall any of his children at the scene when it took place.

Q Okay. Do you dispute Steve Howards' account of approximately five to ten minutes passing from the moment he interacted with Mr. Cheney until he's arrested?

A I would say no more than –

MR. WESTFALL: Objection to form and characterization.

THE WITNESS: I would say no more than five minutes.

BY MR. LANE:

Q Okay. Is it your belief then that approximately five minutes passed from the moment the Vice President of the United States was assaulted by Steve Howards until he was arrested for assaulting the Vice President?

A That's a fair characterization.

[59] Q Okay. Can you give me some explanation as to why you observed a – the crime of assault being committed on the Vice President of the United States of America and you allowed the perpetrator to remain free for five minutes before you jumped in and – or any agents jumped in and arrested him?

MR. GALLAGHER: Object to form.

THE WITNESS: At that point I wanted to observe him a little bit more since there was no – I didn't want to escalate the situation any further than it was with the Vice President being in proximity, so I observed Mr. Howards for a couple minutes more until Mr. Reichle could show up, the – the ID agent, and basically take over the investigation at that point and make the arrest while we still had surveillance on him. Plus he had a package in his hands, which I thought was a – a threat and I wanted him to step away from the Vice President in case there was something in that package that could harm the Vice President.

BY MR. LANE:

Q So let me walk you through this. You see [60] an assault committed on the Vice President by Mr. Howards, correct?

A Correct.

Q Mr. Howards had been talking on a cell phone prior to that about obviously expressing negative feelings toward the Vice President, correct?

A Correct.

Q Mr. Howards is holding an opaque bag in his hands, correct?

A Correct.

Q You have no idea – no idea whatsoever what's in this bag, do you?

A No idea.

Q I think Reichle called it a no mag zone or a mag free zone or – or something. There were no magnetometers there to screen people or to determine what possibly Mr. Howards could have been carrying in that bag; is that correct?

A That's correct.

Q For all you knew he was a suicide bomber; is that correct?

[61] A That's correct.

Q He could have blown up the Vice President and everybody else in Beaver Creek, Colorado standing in proximity to the Vice President for all you knew; is that correct?

A That's correct.

Q He may have had an Oozie sub-machine gun in that bag for all you knew, correct?

A That's correct.

Q All right. So he assaults the Vice President of the United States while holding this bag, correct?

A That's correct.

Q He then stands in proximity to the Vice President of the United States immediately afterwards, correct?

A Correct.

Q Within what did you say? Ten feet or 20 – 20 – 20 feet, something like that? I forget what you said.

A I didn't state any distance –

Q How –

[62] A – after he assaulted the Vice President.

Q I think I did ask you, but I can't remember your answer. You said he then erratically moved through the crowd and hung out in the area, right?

A That's correct.

Q And how far from the Vice President was he hanging out?

A I wouldn't say any further than 20 yards.

Q So this man has just committed a crime in front of your very eyes and is possibly holding a weapon of mass destruction in his hands and you allow five minutes to pass before he – he is contacted by Secret Service; is that your testimony?

MR. GALLAGHER: Object to form.

THE WITNESS: That is my – that is what took place, but I wanted to separate the Vice President and Mr. Howards as much as possible –

BY MR. LANE:

Q Well –

A – because at that time the Vice [63] President was moving to the motorcade –

Q Okay.

A – and putting distance between himself and the Vice President.

Q And was Mr. Howards following him?

A He was walking erratically through the crowd. I wouldn't –

Q Was he –

A – say he was a direct follow, but he was lingering in the area.

Q Well, he was lingering in the area while the Vice President was leaving the area, correct?

A Right.

Q All right. So he's apparently making no effort to tail the Vice President you would agree?

A I wouldn't agree. He could have been probing the crowd for an incident that could have taken place further or on a future date.

Q All things are possible I agree with you. Okay? I'm just trying to figure out why somebody who commits a crime in front of your very nose is allowed to remain free for five minutes, okay, when [64] he may be holding a bomb or a machine gun, and there's no Secret Service investigation done for five solid minutes about those things. Okay? And I'm not going to get into specifics here about what Secret Service is supposed to do under this circumstance or that, but if you suspect somebody may have a very dangerous weapon concealed on their person, you would agree with me that whatever your training is, it does not include allowing that person to approach the Vice President of the United States? Do you agree with that?

A I would agree.

Q Okay. You would agree with me that if you have reason to believe that somebody has assaulted the Vice President of the United States, they should be arrested?

A I would agree.

Q You would agree that your training and experience tells you that under the fourth amendment to the United States Constitution you can only arrest someone if you have probable cause to believe that they have committed a crime; isn't [65] that correct?

A That is correct.

Q You would also agree with me that the first amendment to the United States Constitution allows people to criticize high-ranking public officials face to face when they encounter them in a public forum like they did – like Mr. Howards encountered Mr. Cheney? You would agree with that?

A I agree with that basically, yes.

Q All right. You would also agree that a citizen has a right to petition their government for redress from grievances, meaning if Mr. Howards is aggrieved by U.S. foreign policy in Iraq, he has every right in the world under the circumstances confronting him at Beaver Creek to walk up to the Vice President and tell him that, correct?

MR. WESTFALL: Objection to form.

MR. GALLAGHER: Same objection.

THE WITNESS: I agree.

BY MR. LANE:

Q Okay. You would also agree that if Mr. Howards was arrested in retaliation for having

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EXHIBIT C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STEVEN HOWARDS, Plaintiff, vs. VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity, et. ano., Defendants.	Case No. 06-CV-01964-WYD-CBS

Washington, D.C.

Friday, December 7, 2007

Videotaped Deposition of:

CHARLES P. DURKIN, III

called for oral examination by counsel for Plaintiff, pursuant to notice, at Hogan & Hartson, L.L.P., 555 13th Street, Northwest, Washington, D.C., before Shari R. Broussard, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at 11:01 a.m., when were present on behalf of the respective parties:

* * *

[14] Q Okay. And why did you leave?

A Just ready for – to go into the private practice and get out of the government.

Q Okay. What did you do prior to that?

A I worked for Bill Frist. He was in the majority leader's office.

Q Right.

A Before that, for Senator Graham from South Carolina.

Q Okay. In sort of the same capacity that you worked for the Vice President or –

A A similar one for Senator Frist, and for Senator Graham I worked on a projects team, so that's a lot of the state projects, seeing them through on the federal level.

Q Okay. Can you give me a little bit of other employment background or does that take us back to college graduation?

A It's – I had an internship prior to that at an investment firm in New York called Select Equity, and that backs you up to pretty much graduation.

[15] I went to flight school for a number of months in between there, too, between flight safety and starting in Senator Graham's office.

Q Flight school. Private flight school or –

A Yes, sir.

Q Okay. Tell me a little bit about your educational background.

A I went – graduated from Princeton in 2001.

Q Okay. With a degree in what?

A History.

Q Okay. All right. Do you know why we're here today?

A To an extent, but –

Q What's your understanding of that?

A Basically that I'm just here to – for my witness account, and I really don't know much more about the case –

Q Okay.

A – besides that.

Q Have you reviewed any documents in [16] preparation for coming here today?

A The only document I've seen is the document in front of you, which is my written witness statement.

Q What's your understanding of the nature of the litigation that's currently ongoing?

A I really – I don't have a good one – understanding of it.

Q What's your surmise? What – what do you believe the subject matter is? Do you know?

A Not really. I mean I understand – I mean basically – I – I really don't. I – I – I don't know much about the case.

Q Okay.

A I haven't read about it or –

Q Okay.

A – you know. I'm just sort of just here to do my part.

Q Answer questions?

A Yeah.

Q Okay. I – I understand.

Well, let me ask you on June 16th, 2006 [17] what did you see happen in Beaver Creek, Colorado with the Vice President of the United States and my client Steve Howards?

A On that day I was with the Vice President obviously out there where he was at, AEI, out there.

Q Out there what?

A The American Enterprise Institute.

Q Okay.

A They had a forum there. So we were just on the plaza near – just right out there on what you'd call, I guess, OTR, you know, it wasn't scheduled.

Q What's an OTR?

A I guess off the record. You just sort of, you know, go down there – it wasn't in the official schedule for the day, so we were just walking on the plaza. And people were, you know, people – he was out there just sort of looking at the shops and stuff, walked around getting some fresh air and that's pretty much it. And then Mr. – certain people were out there and would stop [18] and were kind of waiting for him to come up to him and say hi and – which he was – which he did, and I – I believe took some pictures with some people. I remember him taking some, you know, photos with couple of people. But it was a very relaxed atmosphere just outside.

Q Sure.

A And my recollection of Mr. Howard is just how he approached the Vice President. He – he came in sort of a – a determined fashion I would say.

Q Just elaborate on what you mean by "determined fashion."

A Well, as I was explaining about sort of being a relaxed setting out there where people would typically sort of wait for the Vice President to come to them if they wanted to say hi or something, he walked at a, you know, brisk pace, which was – directly up to him and, you know, just places his hand on the Vice President's arm and shook his hand and made a statement regarding Iraq policy and departed.

[19] Q What did he say about Iraq policy?

A I don't recall the whole – I just – it was – it wasn't a favorable opinion of it, but it – but I don't – I don't recall the details.

Q What was the Vice President's response to all that?

A Well, my recollection is that it was very calm. He just shook his hand and said okay, and that's – that's his – sort of just kept on going.

Q He didn't yell "Seize that man," did he?

A No, sir.

Q Okay. He didn't make any noises about go get him, do anything to him?

A Not that I recall.

Q Okay. You would have recalled that had he done that, wouldn't you?

A I would – I would think so.

Q Okay. Has this ever happened while you were accompanying the Vice President in the past somebody comes up and says something critical of him and then walks away?

A There's – definitely, you know, you've [20] seen protestors let's say, you know, driving by the cars, you know, and stuff, and people at events; have yelled while he's speaking –

Q Uh-huh.

A – or something like that, but in my time there no one approached in that manner. That was the reason that I recall it. Otherwise – you know, after, you know, filling that out, I didn't really think much about it.

Q Uh-huh.

A You know, I was just a witness, here it is. But it was unique in that – in sort of his approach to the Vice President.

Q Okay. I mean he – he didn't scream at the Vice President, did he?

A No, sir.

Q He had a polite tone to him?

A You know, I was nearby, but – I could hear his comments, but I – I can't recall that – I would say it would be a – I guess it's hard to paraphrase the tone, but, you know, he was – he wanted to make a statement, he was –

[21] Q Uh-huh.

A – made the statement. It wasn't – he did not yell, no, you know.

Q Okay. I mean and then he walked away, right?

A Yes, sir.

Q Did you attach any significance to what had just happened?

A Yeah, I thought it – well, it was – it was – I thought it was unsettling just how – that he come up. It was unique. It was never – in my time I felt, you know, it just hadn't happened like that before.

Q When you say it was unsettling, tell me if I'm wrong, but were you – was your mind kind of thinking along the lines of geez, you know, this guy could have been anyone with a weapon or done anything and I wonder what the Secret Service is up to? Were those the kind of thoughts that went through your head?

A I can't recall, you know, right – my thoughts, you know, about it right then, you know.

* * *

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Case No. 06-CV-01964-WYD-CBS

VIDEO DEPOSITION OF: STEVEN HOWARDS
EXAMINATION DATE: November 19, 2007

STEVEN HOWARDS,

Plaintiff,

vs.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity; KRISTOPHER MISCHLONEY, in his individual and official capacity; DANIEL MCLAUGHLIN, in his individual and official capacity; DAN DOYLE, in his individual and official capacity; ADAM DANIELS, in his individual and official capacity,

Defendants.

PURSUANT TO NOTICE, the video deposition of STEVEN HOWARDS was taken at 9:04 a.m. on November 19, 2007, at 1430 Wynkoop Street, Suite 300, Denver, Colorado, before Pamela Meade Hansen, Certified Realtime Reporter and Notary Public in and for the State of Colorado, said deposition being taken pursuant to the Federal Rules of Civil Procedure.

Pamela Meade Hansen
Registered Professional Reporter

* * *

[16] headquartered.

Q Okay.

A I remember there was a drive through there.

Q Do you mind if I – can you put the No. 1 –

A At piano class.

Q – at the point you think the piano class – recital was?

A Piano headquarters.

Q Great.

A This is the escalator. This is the plaza. There's another escalator. Here's a little grocery store that I was talking about. And I don't remember if the class was – I don't remember if the class was here or here. It could have been at the top of the escalator or at the bottom of the escalator, I just don't remember, but I remember the – my meeting the Vice President was somewhere between the bottom of this escalator and the top of this escalator. Okay?

Q Okay. So at the time that you saw the Vice President, your son Jonah was with you.

A Correct.

Q Right? And your wife was in the [17] recital with Koby?

A Correct.

Q What did you do when you first recognized the Vice President?

A Probably stopped and stared.

Q And did you tell your son, There's the Vice President?

A I don't recall. Probably, but I don't recall.

Q Now, at some point in time you made the decision to approach the Vice President, correct?

A Correct.

Q Approximately how long – how much time passed between the time you first saw the Vice President and the time you made the decision to move toward the Vice President and speak with him?

A A minute, something like that.

Q Now, during that period of time did you have a cell phone with you?

A Probably, but I don't recall.

Q Have you read any of the witness statements that have been produced by the defendants in this case?

A I've scanned them.

[18] Q Okay. So you're aware that at least one agent reports in his witness statement that he overheard you speaking on your cell phone about the Vice President, correct?

A I – I'm not aware of that.

Q Okay. Do you remember taking out your cell phone and calling someone and telling them that you had seen the Vice President?

A The only person I would have called would have been my wife, and I – I don't recall – usually I carry a cell phone. I don't recall if I was carrying one then or not. I – you can tell by – when – when the agent went through my pockets, you can – I'm sure that it will tell you whether or not I was carrying a cell phone, but I don't recall.

Q Well, Agent Doyle specifically stated in his report that he overheard you say on your cell phone something about, "There's Vice President Cheney, I'm going to ask him if he's killed any kids today." Do you recall making that statement?

A No.

Q If Agent Doyle testified that he heard you make that statement, would you deny that you made that statement?

[19] A I have no recollection.

Q Okay. Is it – is it at least possible that you made that statement?

A I have no recollection.

Q In any event, at some point in time you decided that you were going to walk towards the Vice President, correct?

A Correct.

Q At the time you initially saw Vice President Cheney, how far away was he from you?

A Would you repeat your question?

Q Sure. At the time you initially saw Vice President Cheney, how far do you think Vice President Cheney was away from you?

A Oh, 15 feet.

Q So, when you initially saw him, did you come around a corner and he was there, or did he come out of a – did he come out of a store?

A He came out of the store.

Q Up until the time you actually saw Vice President Cheney, did you have any reason to believe that there were any VIPs or dignitaries close by?

A I – I had no – no reason to believe either way.

[20] Q So you didn't initially identify people that were standing around as United States Secret Service agents?

A I assumed – I – no.

Q So, what was your first reaction when you saw Vice President Cheney?

A He was smaller than I expected.

Q So, you said about a minute passed by before you actually decided to walk up to the Vice President; is that – that right?

A A minute, a few minutes. I don't – I don't remember the exact number of minutes.

Q During – during that time period between the time you first saw him and the time you decided to approach him, what was – what was Vice President Cheney doing?

A He was shaking hands and taking pictures with people.

Q Can you describe for us how crowded the plaza was at that time?

A There were people in the plaza. I – I don't – I can't tell you if there were five people or 50 people because I wasn't paying attention to that.

Q Did it seem like a crowd had [21] assembled to – to meet with him?

A It depends how you define a crowd.

Q Would you consider it to have been crowded, using your definition of the term "crowded"?

A Not especially.

Q Who was around Vice President Cheney when you first saw him, do you recall?

A There were – there were – you know, going back to your original question, there were people near

him with wires, which one could have assumed were the police or agents, but I had no way to know whether that in fact was the case.

Q And when you say "with wires," do you mean ear pieces?

A Yes.

Q Was – was Mrs. Cheney with the Vice President?

A I didn't see her.

Q Were there any kids that appeared to be hanging around the Vice President, his grandchildren perhaps?

A Not that I noticed.

Q Were there any photographers around him or any aides around him that you noticed?

[22] A I believe there was a photographer.

Q So, during that minute or couple of minutes between the time you actually saw him for the first time and decided to approach him, can you give us some idea about how many people came up and either spoke to the Vice President or shook his hand or asked for an autograph?

A Before or afterwards?

Q Before – before you approached him.

A I wasn't counting. I don't know. Several, but I don't know whether it was three or five or 10.

Q Were they –

A I wasn't the first person to shake his hand. I wasn't the first person to approach him, let me put it that way.

Q Were – were they adults or children or a mix?

A I didn't – I didn't pay attention. I know – I know there were adults. Whether there were children there as well, I don't know.

Q So, at some point in time, though, you decide to approach the Vice President, correct?

A Correct.

Q Okay. And at the time you decided [23] to move forward and approach the Vice President, how, far was he from you?

A 10 feet, 15 feet.

Q Where was Jonah at that time?

A You know, actually, I'm – I was wrong. I was accompanying Koby to the recital, and when I saw the Vice President, I stopped and Koby kept on because we were close enough for him to know where we were, and Koby continued on to the recital. And then after I saw the Vice President, I continued on to make sure Koby got where he was – where he was going.

Q Okay. So, you encounter the Vice President. You're – you're pretty – you're pretty close to where the recital is, so Koby goes on to the recital.

A Correct.

Q Why didn't you accompany Koby to the recital?

A Well, because I was focused on talking to the Vice President and I lost track of Koby.

Q Okay. Did you – did you become confused and lose track of him, or did you say, Why don't you go on to the recital, I'll catch up?

[24] A No. I think I was – I don't recall. I – I think I stopped, spoke with the Vice President, and Koby just wandered off, just continued on. We weren't very far from where he was going.

Q Okay. So, let me – let me take you back to my questions. I want to now sort of walk through –

A Sure.

Q – your decision to approach the Vice President and – and what happened then. Why did you decide to approach the Vice President?

A Because I had something to say to him.

Q And what did you want to say to him?

A I wanted to tell him that I thought his policies in Iraq were disgusting.

Q Why was it that you wanted to say that?

A Because that's the way I felt, and I wanted to express my First – I wanted to utilize the First Amendment to express my opinion.

Q Did you expect to engage in a discussion with the Vice President?

A No.

[25] Q Had you heard anybody – during the time that you were observing people interacting with the Vice President, had you heard anybody else raise Iraq or any other political or social issue with the Vice President?

A I wasn't listening.

Q Were you – were you close enough to hear conversations, or were you far enough away you couldn't hear those conversations?

A I – I just wasn't – was I close enough? I don't remember how far I was away – how far I was away. I just wasn't – I wasn't listening.

Q So at the time you decided to move towards the Vice President, I think you said you were 10 or 15 feet away from him, right?

A As best I can recall.

Q Were there any people in between you and the Vice President?

A I don't recall.

Q Okay. So you don't recall having to walk around anybody to get up to the Vice President?

A I – I don't recall that, no.

Q How many steps do you think it took you to go from where you were to where the Vice [26] President was? I know – understand you weren't counting steps, but if you could give us some idea about how long it took you to get there.

A A few seconds.

Q So, you start moving toward the Vice President, correct?

A Correct.

Q Can – can you walk me through what then happened? As you start moving forward, what – what then happens?

A The Vice President emerged from this grocery and began shaking hands and conversing with people. I waited until the conversation – their conver- – their conversations were done, and I stepped forward and spoke with the Vice President.

Q What did you say to the Vice President?

A "Your policies in Iraq are disgusting."

Q How did he respond?

A He said, "Thank you."

Q Did you shake his hand when you approached him?

A No.

Q Okay. Did you touch him in any way?

[27] A When I left, I did.

Q Okay. So, walk me through how that went. You approach the Vice President. You – you say that you disagree – that his policies in Iraq are disgusting.

A Correct.

Q What – what was the next thing that happened?

A He said, "Thank you."

Q After he said, "Thank you," what's the next thing that happened?

A I left.

Q At what point did you touch the Vice President?

A As I was leaving.

Q Okay. And explain to me how that occurred. What happened?

A As I walked away, I touched him on the shoulder, on his right shoulder, with an open hand.

Q Had – did you shake his hand with – at all?

A No.

Q So, you didn't shake hands. You actually just touched his right shoulder.

[28] A Correct.

Q Did you touch his right shoulder with your left hand?

A Yes.

Q And you say your palm was open?

A Correct.

Q How forceful was it?

A It was a pat.

Q And when you touched him, I believe you were reported in at least one newspaper to have noticed that he seemed to have a silk suit on, right?

A That is correct.

Q He was wearing silk. What was the Vice President wearing at that time?

A He was wearing kind of a natty silk jacket.

Q Did he respond at all to your touching him?

A I don't know. I left.

Q Okay. He didn't say anything to you?

A No.

Q He didn't make any movements in response to that?

[29] A No.

Q Any facial expressions at all?

A No. Again, I touched him and I left, so my back was to him at that point.

Q So, you touched him and then you turned around 180 degrees and moved away.

A No.

Q Is that right?

A I touched him like this (indicating) and I moved on.

Q Okay. So you walked – you walked away from him, though.

A Correct.

Q In the time that you observed people interacting with the Vice President, did you see anyone else touch him?

A Absolutely. Yes.

Q Did anybody shake his hand?

A Yes.

Q Okay. What other touching occurred other than the shaking of hands?

A There were hugs, there were group photos, there were all sorts of things.

Q At the time that you told the Vice President that you disagreed with his policies in [30] Iraq and you touched him on his left shoulder, do you recall anyone standing around you or the Vice President at that point?

A I don't recall, no.

Q And then when you say you – you left the area, did you continue to walk past the Vice President?

A No.

Q Okay. Because, you know, presumably you approached the Vice President head on.

A Correct.

Q You talked with him. When you moved away, can you maybe draw on our Exhibit 1, on the map, your – your route to the Vice President and then your route away, just so that I can get a feel for sort of how that –

A I approached him. The conversation was done. I pat him on the shoulder, and I walk that way.

Q Okay. Would you mind drawing the routes on our exhibit, just so that we've got a record of it?

A (Deponent complied.)

Q Okay. So, after you encounter the Vice President, you continue to walk past him, [31] correct?

A Correct.

Q At the time that you actually encountered the Vice President, just so that I'm clear, Koby you believe was in his recital.

A Correct.

Q And Joshua –

A Jonah.

Q Jonah, I'm sorry. Jonah was with your wife.

A Correct.

Q Do you know where they were at that point?

A In the recital, in the recital hall.

Q So, after you encountered the Vice President and you started to move away, what's the next thing that you did?

A I mean, the next thing I did was I went to see where Koby was to make sure that Koby got where he was supposed to go.

Q So you went to the – was it a hall where the recital was occurring?

A Yes.

Q How long did you – did you go inside that building?

[32] A Yes.

Q To make sure that he was there?

A Correct.

Q And I assume he was there, correct?

A Correct.

Q Once you realized that he was there, what did you do next?

A I told my wife – I believe I told my wife that I had spoken with the Vice President, and she said – I don't remember what she responded, and then – and then she asked me if I'd take my younger son back to the condo.

Q You don't recall anything about the conversation you had with your wife?

A No.

Q Did you – do you recall telling her what you said to the Vice President?

A I don't recall.

Q So, did you then start to go back to the condo?

A Correct.

Q Okay. And you had Jonah with you at that point?

A Correct.

Q Did you come out the same way that [33] you had gone into –

A Yes.

Q – the hall? When you – when you exited the hall –

A I – I followed the exact same steps – I'm sorry, I didn't let you finish.

Q That's fine.

A All right.

Q Why don't you tell me what you did. You followed the exact same steps?

A Followed the exact same steps because the way Beaver Creek is laid out, there's only one place – only one way to get from Point A to Point B and back again, so I – I repeated my steps.

Q So you walk outside the building, back to the daylight.

A Right.

Q Where was the Vice President at that point?

A I believe he had rotated counterclockwise around the mall, and he was – and I believe he was taking pictures with other families, and I say that because I remember seeing that at some point, and I believe that's when I saw that. [34] I'm not sure, but I believe that's when I saw that.

Q Okay. But he was still within eyesight of you, correct?

A As I recall, yes.

Q Okay. Approximately – when you – when you – when you left the building and came back out into the daylight, approximately how far away was the Vice President, if you can recall?

A 50 – I don't know, 25 yards, 50 yards.

Q Okay. Now, at the time – let me – let me take you back to the time that you entered that plaza. You were carrying a bag, right?

A Correct.

Q What was in the bag?

A Shoes.

Q Can you describe the bag for me? I mean, what did it look like and –

A A plastic bag.

Q Was it like a grocery store bag?

A It was a white plastic bag. I – I don't know. It was a white plastic bag.

Q And there were shoes in it?

A Correct.

Q What kind of shoes?

[35] A Just leather casual shoes.

Q Were they in a box or were they loose?

A They were in a box.

Q So, inside a shoebox, correct?

A Correct.

Q Anything else in the bag?

A No.

Q At the time you approached the Vice President, do you recall what hand the bag was in?

A No.

Q How were you dressed that day, if you can recall?

A Casual, jeans and a T shirt.

Q So, you go into the – back into the – into the concert hall, or whatever it is, and you pick up Jonah, and you come back out. Did you still have the bag with you?

A Yes.

Q Were you holding hands with Jonah or was he walking next to you? Where was he physically in relation to you?

A He was alongside of me.

Q So, once you come out of the building, what's the next movement that you made?

[36] A I believe I saw the Vice President, and I was trying to show Jonah the Vice President since he had not seen him.

Q And how did you go about doing that?

A I didn't because Jonah disappeared.

Q Where did Jonah go?

A I don't know.

Q How could you have lost Jonah as you exited that building?

A Excellent question. He's a – he's a – at that point he was eight years old, and it's hard to keep your – hard to keep your eyes on an eight-year-old sometimes.

Q Is it fair to say that you were watching the Vice President when he exited?

A It's fair to say I glanced at the Vice President when – when we – when we began leaving.

Q Do you have any idea where Jonah went?

A At that particular time, no.

Q So, when you – when you exited the building, you see the Vice President. When did you first notice that Jonah wasn't with you?

A When I saw the Vice President.

[37] Q Okay. What did you do next?

A I looked for Jonah.

Q How did you go about doing that?

A I glanced around. I just glanced around to see where he was.

Q Did you find him?

A No.

Q So, what's the next thing you did after that?

A I was confronted by – by Gus.

Q That's – that's Agent Reichle, correct?

A Agent Reichle.

Q Okay. Where were you standing when Agent Reichle approached you?

A Someplace between the two escalators, but I don't remember exactly where.

Q Okay. So, you had – you had walked out of a building. Do you – do you recall how far you went before Agent Reichle approached you?

A I don't. I'd guess it was – I don't recall. 20 feet, 30 feet, but I just don't recall.

Q At the time that Agent Reichle approached you, were you standing still or moving?

[38] A I was moving until he approached me.

Q And you were moving toward an escalator?

A At that point I was – I was standing there trying to figure out where Jonah had gone.

Q Okay. But you had – you had moved to a certain point and then you stopped?

A Yeah. Yes.

Q And that's when Agent Reichle approached you?

A Yes.

Q Did – do you know where the Vice President was at the point that Agent Reichle approached you?

A Again, I believe he was to my right, counterclockwise, more towards the middle of the mall, taking pictures. I remember he was there at some point. I believe that's when – I believe that's when I saw him there.

Q So at the point that Agent Reichle approached you, were there any other people around you?

A I don't recall.

Q So, Agent Reichle approaches you. [39] What – what's the first thing that happened when he approached you?

A He showed me his Secret Service badge.

Q Did he say anything?

A He asked if he could talk with me.

Q He identified himself as a Secret Service agent, correct?

A I don't recall. He showed me his badge.

Q But you don't recall him saying, I'm a United States Secret Service agent?

A I don't recall.

Q So he shows you the badge and he asks if he can speak with you.

A Right.

Q How did you respond to that?

A I told him no, he couldn't.

Q Did you say anything other than that?

A No.

Q Okay.

A Not that I recall.

Q Okay. Agent Reichle has indicated in his report that you said words to the effect of, [40] and let me – let me get this right because I want to make sure of the exact words. You said words – this is what he – he reports that you said. He reports you said, "Fuck you. I don't have to talk with you and I won't talk with you." Do you recall saying that?

A I did not say that.

Q Did you use the word "fuck" at any time with Agent –

A I never swore at Agent Reichle.

Q Okay. But you do recall telling him that you did not have to talk to him?

A I told him I would not – he asked me if I could talk with him, and I said, no, he couldn't.

Q How did he respond to that?

A He – he – he pursued me with questions.

Q Okay. So, after that – after you had that initial encounter with Agent Reichle, you began moving again, correct?

A If I did, it wasn't by more than a few feet.

Q Okay.

A If I did, it was to see if I could [41] I figure out where my son was.

Q Okay. And then Mr. – and then Agent Reichle approached you a second time, correct?

A Correct.

Q What happened then?

A He – he asked – he said – he asked me if I had assaulted the Vice President.

Q How did you respond?

A "No."

Q What's the next thing that happened?

A He asked me again, he asked me a similar question again, and he was impeding my ability to

move – to move. He stepped in front of me. And I don't remember the exact question, but I remember responding to him and pointing my finger at him and telling him, and I remember this specifically, I didn't assault the Vice President, but I did tell him the way I felt about the war in Iraq, and if you don't want other people sharing, their opinions, you should have him avoid public places. Those were my words.

Q Now, the – when you – when you initially responded to Agent Reichle that you would not speak with him, why wouldn't you speak with him?

A I didn't – I – I had no [42] obligation.

Q Whether or not you had an obligation, why wouldn't you speak with him?

A Because I was – I was on vacation with my son.

Q Were you angry at that point?

A Was I angry at that point. I was irritated that he approached me.

Q So, you start to move on, and then he actually gets in front of you and impedes your movement, correct?

A It was clear that he wasn't going to leave me alone.

Q Right. So, you told him that you had not assaulted the Vice President.

A Correct.

Q Did he ask you any additional questions?

A I don't recall any additional questions at that point.

Q Is it fair to say that at that point you were more agitated than you had been seconds earlier when you initially contacted Agent Reichle?

A I was irritated.

Q What's the next thing that happened?

[43] A I – I started to walk away because I was still looking for my son, and at which point heard. Agent Reichle behind me talking with other agents, and I heard him ask, I believe it was Mr. Winters, if he had seen me – at some – if he had seen me touch the Vice President. And I remember – and there were several agents he was asking this question, and I believe Mr. Winters or some of the other agents asked him whether he had seen me touch the Vice President, and there was some degree of – it's – it appeared as though no one had seen that occur. I believe he may have asked me at the time – well, and I'm trying to remember. At some point he said to me – I believe there actually – he also asked me if I touched the Vice President.

Q How did you respond to that?

A I believe I said I hadn't.

Q Okay. And that wasn't truthful, was it?

A That wasn't accurate.

Q Do you recall him asking you any additional questions?

A No. That's what I recall.

Q So, what's the next thing that happened?

[44] A He asked – I remember him – I remember him asking other agents whether they had seen it. I believe they said no. Then he asked the agents to go into the crowd and see if anyone else – or go into the – you know, go into the – talk to the public and see if anyone else had witnessed me touch the Vice President, because at some point he said, Touching is tantamount to assault. And I don't remember whether that was to me or to the other agents.

Q Where were you standing when you heard him say that?

A All I can – all I remember is my back was to him and I was looking for my son.

Q And up to that point, you had not told the Secret Service agents, either Reichle or anybody else, that you were – your son had disappeared and you were looking for your son, right?

A That's correct.

Q What's the next thing you recall happening?

A Agent Reichle – I remember – I believe, either before or after, some guy emerged – someone

emerged from the crowd, said they had seen [45] me touch or assault the Vice President, at which point Agent Reichle grabbed me, handcuffed my hands behind my back, and told me I was being charged with assaulting the Vice President.

Q Now, when somebody emerged from the crowd and told that to Agent Reichle, did you see that person?

A Yes.

Q Okay. How was that person dressed?

A I believe that person – I – I believe that person was wearing a plaid or a flannel shirt, and I remember they were fairly young, I'd guess in their 30s.

Q Male or female?

A Male. But, you know, a lot of stuff was happening, so I don't have perfect recall on that.

MR. WESTFALL: Could we – just for my benefit, please, I just want to make sure I'm clear on that. Could you read back that last couple of questions and answers if you would, please? So I can keep track of – maybe there was something that I wasn't –

THE REPORTER: Where do you want me to start? "How was that person dressed," do you [46] want to start there?

MR. WESTFALL: Okay. Before how the person was dressed. I want to get – make sure that

we're clear about who we are talking about coming out of the crowd. It was kind of – it was kind of jumbled in my mind, and I just want to make sure I understand what your testimony is with respect to –

THE DEPONENT: Sure, that's fine.

MR. WESTFALL: – you know, just before the arresting decision.

MR. GALLAGHER: Do you want to read the transcript on the screen?

THE DEPONENT: Can I go to the bathroom quickly?

MR. GALLAGHER: Yes. Would you like to take a break here?

MR. LANE: Sure.

MR. GALLAGHER: This might be a good time for a break,

THE VIDEOGRAPHER: Going off the record, the time is 9:49. (Recess taken)

THE VIDEOGRAPHER: We are back on the record. The time is 10:01.

Q (BY MR. GALLAGHER) Mr. Howards, [47] before we took our break we were – I was asking you questions about what happened during the encounter with Agent Reichle. And you testified that an individual, a male, came out of the crowd and reported that he had seen you touch or assault the Vice President.

Do you know whether that was a Secret Service agent or not?

A The person from the crowd, I – I don't know.

Q Okay.

A No, I – no. I – I don't believe that person was a Secret Service agent.

Q So you just – you just don't know who it was.

A No.

Q Okay. What's the next thing you recall happening at that point?

A At some point during this whole situation, I remember Reichle saying, Touching is tantamount to assault. I don't remember if it was when he was questioning me. I don't remember if it was when he was asking the agents if anybody had seen it. I don't – I don't recall where that happened, but I remember that occurred.

After this person came out of the

* * *

[128] encounter with him?

A I did not, but recall that after I spoke with the Vice President, I intentionally left so as not to create an incident. I did not see the Vice President again for at least five minutes, so I have no idea what occurred from the time I left the Vice President until I returned.

Q Did you hear at any time the Vice President call out for help or assistance from any agents after you had your encounter with him where he was seemingly in distress or in need of an agent's protection from you?

A No, I did not.

Q Were you able to observe – well, withdrawn. From the time you touched him on the shoulder until you were arrested, approximately how much time passed?

A Oh, approximately five-plus minutes.

Q Were you free to walk around and do whatever you needed to do in the period of time from the time you touched the Vice President until Agent Reichle arrested you?

A Yes.

Q Did any agents at any time [129] immediately make a move to seize you upon your having touched the Vice President?

A No, they did not.

Q Was there any discussion among the agents that you were aware of regarding whether or not they had any reason to be detaining you? Other than what you've read in discovery, I'm asking, do you have any recollection –

A No, I do not.

Q – of agents actually talking back and forth about, Why are we stopping this guy, should we stop this guy, should we question this guy?

A I'm not aware of any such discussions.

Q Okay. When you were handcuffed – prior to being handcuffed, were you asked to empty your pockets or did agents empty your pockets for you?

A They emptied my pockets.

Q Did agents put on any latex gloves prior to emptying your pockets that you recall?

A Not that I recall.

Q Did agents search through the plastic bag that you were carrying?

[130] A No, they did not.

Q How did your wife end up with the plastic bag?

A Agent Reichle – I believe it was Agent Reichle thrust it at her as we were leaving.

Q When you say "thrust it at her," does that mean roughly handed it to her, or threw it –

A Yes.

Q Okay.

A Roughly handed it to her.

Q All right. After you were handcuffed, did you see any agents talking to Vice President Cheney about whether or not – well, first of all, just – withdrawn.

Did you see any agents after you were handcuffed talking to the Vice President?

A No, because, again, I was leaving. I was leaving the scene, so I didn't.

Q Do you have any personal knowledge whether any agent ever spoke to the Vice President of the United States prior to your being arrested or subsequent to your being arrested about his being the victim of either the crime of assault or the crime of harassment?

[131] A I have no such knowledge.

Q Five minutes after you touched the Vice President and then you came back into the vicinity, was the Vice President still there?

A Yes.

Q Did he seem to be – well, what was his demeanor at that point? Did he seem afraid, did he seem alarmed, or was he still engaged in shaking hands, slapping backs, and signing autographs?

A He was still engaged in taking family photos, accepting hugs, putting his arms around people, putting – people putting their arms around him. There was no change in demeanor, other than the fact that the crowds had gotten slightly larger.

Q Had the Secret Service at that point whisked the Vice President away based on any perceived – anything, any threats, anything that you were able to see?

A No, they had not.

Q And this is five minutes after you touched the Vice President?

A At least five minutes.

Q Do you have any estimate as to approximately how many people you saw touch the Vice

* * *

[165] AFFIDAVIT

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I have read my deposition, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the amendment sheet(s) attached hereto as indicated.

Amendment sheet(s) attached [ ]

No changes; no amendment sheet attached [ ]

/s/ Steven Howards
STEVEN HOWARDS
(February 28, 2008)

SUBSCRIBED AND SWORN TO before me this 7th day of March, 2008.

My commission expires: Aug. 9. 2011

/s/ Jacqueline M. Barker
NOTARY PUBLIC

in and for the State of Colorado

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEVEN HOWARDS, Plaintiff, v VIRGIL D. "GUS" REICHLE, JR., KRISTOPHER MISCHLONEY, DANIEL MCLAUGHLIN, DAN DOYLE, ADAM DANIELS, Individually and in Their Official Capacity. Defendants.	CASE NO: 06-CV-01964-WYD-CBS

CONFIDENTIAL

Washington, D.C.

Tuesday, November 27, 2007

Deposition of:

KRISTOPHER MISCHLONEY

called for oral examination by counsel for Plaintiff, pursuant to Notice, at the Law Offices of Hogan & Hartson, 555 13th Street, Northwest, 12th Floor, Washington, D.C., before Mary E. Warner of Capital Reporting, sworn by a Notary Public in and for the District of Columbia, beginning at 4:16 p.m.

* * *

[10] A Yes.

Q And you also understand that not every touching is a crime?

A Yes.

Q All right. And you heard Agent Reichle go through the nature of touchings. Do you agree with his assessment of –

A Yes, I do, I do.

Q All right. Simply touching someone to get their attention is not a crime, is it?

A No.

Q All right. But going up and just shoving someone, that is a crime, correct?

A Yes, yes.

Q Did you know what this individual had done when you were – when you had it explained or did they just say there was some sort of a touch or a push or incident of some sort?

A They said there was an incident of some kind. They believed he had been pushed. And they wanted me to find him and Agent Reichle is what they asked me to do.

[11] Q Okay. And you said you assumed this was some sort of a lower level kind of thing because obviously if were a big deal –

A Nobody was running, there were no guns out, I assumed it wasn't.

Q Okay. So what did you do then?

A I went through the crowd until I found an individual that I believe was Mr. – was the individual that I was told to follow. I followed him through the shopping area.

At that time it appeared to me he was trying to leave the area. He was moving at a very quick pace, there's a set of escalators leading down to a parking garage and the condo area. So I assumed he was leaving the area. I was actually prepared to approach him.

We've talked about already about the various jobs that everybody has in a protective situation. My job that day wasn't to talk to people like that but at the time I didn't see Agent Reichle. I was going to talk to Mr. Howards before he left but at about that point I saw Agent [12] Reichle coming across in the front. And he actually stopped Mr. Howards and started speaking to him.

Q And what did – and what happened?

A Agent Reichle approached Mr. Howards, introduced himself, showed him his identifications and said, "Can we speak to you for a few minutes."

Q And what did Mr. Howards say?

A Mr. Howards immediately became belligerent.

Q What did he say?

A He said, "Fuck you. I don't have to speak to you."

Q Did you believe that to be a correct statement of the law?

A He doesn't have to speak to us but his mannerism at that point – I was actually backed off a few feet because like I said it was Agent Reichle's call to speak to him. I immediately closed the distance because I thought he was going to become violent, I truly did, the way he – he just immediately became belligerent, immediately [13] jabbing his finger towards Agent Reichle. It set off alarm bells. I thought – I thought he was going to become violent any second.

Q But do you believe he correctly stated the law he doesn't have to talk to you?

A He didn't have to speak to us but in the totality of the circumstances I thought we had the right to stop and speak to him.

Q And then when you determined he did not wish to stop and speak to you, what then happened?

A Agent Reichle attempted to reengage him, saying, "We just need to talk to you for a couple minutes." He again let loose with a few more expletives, turned away and began to walk away back in the direction of the where I believe the Vice President still was.

Q Towards – towards where the Vice President was?

A In the same general area, he was heading back. They might have crossed paths. I didn't know where the VP was at that time.

Q Did you have probable cause to believe he

* * *

[22] Q And you did go to law school?

A Yes.

Q And your training tells you that the Miranda versus Arizona, for example, tells you what?

MR. GALLAGHER: I would object to the form of the question.

BY MR. LANE:

Q Go ahead.

MR. GALLAGHER: You can answer it, I guess.

(Discussion had off the record.)

BY MR. LANE:

Q Okay. Go ahead.

A If he was in custody, we he to provide him Miranda rights in which he could refuse to speak to us.

Q And when somebody is in custody, what does that mean? How do you know whether someone was in custody or not?

A They're not free to leave.

Q Was Mr. Howards free to leave.

[23] A Until we put him in handcuffs, yes.

Q Well, he said, "Go fuck yourself. I don't want to talk to you," and tried to walk away, isn't that right?

A We still – I still had an obligation to find out what was going on. His behavior told me that he was dangerous and he was heading back in the direction of the Vice President. I felt we needed to stop him.

Q Was he free to leave or not?

A We stopped and determined whether or not we were going to arrest him is what we did.

Q Okay. And he says, "Go fuck yourself. I don't want to talk to you," and starts to walk away, correct?

A Yes.

Q What happened then?

A Agent Reichle turned and looked at me and said, "Did you see what happened?" I said, "No." He asked the other two, the CSU agents, "Did you see what happened?" One of them said, "I saw him put hands – on the Vice President," which in the [24] common parlance is something beyond touching his

shoulder, something to the point of pushing or violent actions.

Q And that was Agent Daniels that said that, correct?

A I don't recall which one. I was actually watching Mr. Howards walk away at the time.

Q Did you see Agent Doyle on scene?

A As we started to move back towards Mr. Howards, as I said, he was moving away from him, I recall on my right-hand side was Agent Reichle. On my left were, I believe, Agent Daniels and Agent McLaughlin.

At that point I recall Agent Doyle walking up saying, "He pushed him. He pushed the VP." And I recall him doing the strike like he demonstrated.

Q You recall Doyle doing what Reichle says he did?

A Yes.

Q And demoing the striking blow from behind?

[25] A Yes.

Q And where were McLaughlin and Daniels standing when Doyle demoed on Reichle what happened?

A They were moving slightly off to my left, is what I recall. Like I said, we were moving after Mr. Howards. I didn't want to lose him in the crowd. I

remember we were moving towards him in cas we wanted to speak to him, engage him or whatever. So I don't know whether they saw it or not. I honestly don't.

Q So correct me if I'm wrong, but at that time you, Reichle and Doyle were all part of the Denver based team, is that right?

A No, I was out of Denver, Mr. – or Agent Reichle is out of Denver. Agent Doyle is actually based in Washington, DC.

Q Okay. But he has a prior relationship with Reichle, correct?

A Yes.

Q Okay. Okay. Steve Howards says, "Fuck you. I don't want to talk to you," starts to walk

* * *

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEVEN HOWARDS, Plaintiff, v VIRGIL D. "GUS" REICHLE, JR., KRISTOPHER MISCHLONEY, DANIEL MCLAUGHLIN, DAN DOYLE, ADAM DANIELS, Individually and in Their Official Capacity. Defendants.	CASE NO: 06-CV-01964-WYD-CBS

CONFIDENTIAL

Washington, D.C.

Tuesday, November 27, 2007

Deposition of:

DANIEL MCLAUGHLIN

called for oral examination by counsel for Plaintiff, pursuant to Notice, at the Law Offices of Hogan & Hartson, 555 13th Street, Northwest, 12th Floor, Washington, D.C., before Mary E. Warner of Capital Reporting, sworn by a Notary Public in and for the District of Columbia, beginning at 8:09 a.m.

* * *

[74] Q Okay. But you didn't – you didn't hear him cry out in pain, did you?

A No.

Q You didn't – he didn't ask – to your knowledge, the Vice President didn't say to some of the agents standing there, like, "Get this guy off of me" or "Help me" or anything along those lines, did he?

A Not to my knowledge.

Q Okay. Do you know whether he responded to Mr. Howards?

A No, I do not.

Q And you indicated earlier you've never in your entire career spoken to the Vice President, is that correct?

A The Vice President asked me if it had been raining all night one time when I was standing out by the front door. And I believe we said hello to each other on a number of occasions, but to have a extended conversation, no, sir.

Q Okay. Tell me what your understanding is of the reason that Steve Howards was arrested on [75] that day.

A My understanding of why he was arrested?

Q Yeah.

A My understanding of why he was arrested would be when he became abusive and escalated the situation towards Agent Reichle.

Q And how did he become abusive to Agent Reichle?

A When Agent Reichle approached Mr. Howards, he identified himself as Secret Service, told him he needed to speak with him.

And Mr. Howards said, "I don't want to talk to you."

And then Mr. Reichle indicated again that he needed to speak with him. And then whatever – I remember it ended with Mr. – Mr. Howards telling Mr. Reichle to either F off or F you.

And then he tried to – to leave the area again, and Agent Reichle at that point made a general statement of did anyone see Mr. Howards.

Q When you say he made a general statement, describe the scene. Who was he talking to? He [76] wasn't talking to himself, was he?

A No. The – the agents who were there were myself, Adam Daniels and Dan Doyle. Those – those are the other people I knew were standing in close proximity.

Q Okay.

A And Agent Reichle asked if anyone had seen Mr. Howards' touch or put his hand on, or something to that effect, the Vice President.

Q Let me ask you, are you sure that's what he said, or did he say, "Did anybody here see this man assault the Vice President"?

A I did not hear the word "assault." I heard, "Did anyone see him touch or put his hand on him," or something to that effect.

Q Okay. And so what happened then?

A Agent Daniels said, "Yeah, I did." At which point Agent Reichle indicated to Mr. Howards that he was under arrest for assaulting the Vice President. And Mr. Howards then tried to resist Agent Reichle when he was attempting to handcuff him.

[77] Q What did he do?

A He spun on him and raised his arm up, which I would – which I took as – as that he was going to attack Agent Reichle.

Q So did you pull your gun?

A No, sir. I stepped in and I – I took control of your client's arm and Agent Daniels stepped in from the other side at which point Mr. Howards put his hands behind his back.

Q Well, that's resisting arrest, then, isn't it?

A Yes, it is.

Q Okay. That's a crime, isn't it?

A Yes, it is.

Q Was he ever charged with resisting arrest?

A That I do not know.

Q Okay. Would you agree that if he was never charged with resisting arrest, then the person who motivated the filing of charges obviously never thought that he was resisting arrest?

* * *

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEVEN HOWARDS, Plaintiff, v VIRGIL D. "GUS" REICHLE, JR., KRISTOPHER MISCHLONEY, DANIEL MCLAUGHLIN, DAN DOYLE, ADAM DANIELS, Individually and in Their Official Capacity. Defendants.	CASE NO: 06-CV-01964-WYD-CBS

CONFIDENTIAL

Washington, D.C.

Tuesday, November 27, 2007

Deposition of:

ADAM DANIELS

called for oral examination by counsel for Plaintiff, pursuant to Notice, at the Law Offices of Hogan & Hartson, 555 13th Street, Northwest, 12th Floor, Washington, D.C., before Mary E. Warner of Capital Reporting, sworn by a Notary Public in and for the District of Columbia, beginning at 10:07 a.m.

* * *

[62] Q Well, now as you sit here today you know he didn't have a warrant, isn't that correct?

A You're right. Correct.

Q And so therefore, he had probable cause because he wouldn't be arresting Steve Howards if he didn't have probable cause, is that right?

A That's correct.

Q Okay. Before Agent Reichle put the cuffs on Steve Howards, did he ask you what your observations were back at the scene with the Vice President?

A Agent Reichle asked a general question to the agents in the area if you had seen the touch, did you see it, did you see the touch?

And I responded, yes, I saw it.

Q And describe that interaction. You saw it, and did he then question you about it?

A No, but I demonstrated later – I – I demonstrated later for Agent Reichle what I saw.

Q Later after Steve Howards was arrested?

A After – after he was placed in handcuffs, yes.

[63] Q That's being arrested, isn't it?

A At that point, you know, being taken into custody, being handcuffed, you know, at the point that he's arrested, yes.

Q Okay. So you demonstrated to Agent Reichle after Steve Howards had already been arrested what you saw, is that correct? Yes or no?

A Yes.

Q Okay. All right. Let's backtrack now back to Beaver Creek –

A Yes, sir.

Q – the – the area where this encounter occurred. You see the touching. Where did Steve Howards go at that point after the interaction with the Vice President?

A He began walking with a woman, and I can't recall if it was with one or two small boys, I can't recall. And they began walking – after the Vice President departed, they began walking in the same direction as the Vice President.

Q Would you agree that the agents in the – [64] in the protective squad that day standing very close to the Vice President were in a much better position to have seen and heard everything that went on there than you were?

A Yes, they were.

Q All right. Do you believe that it is consistent with the training of an agent with the Secret Service to allow someone who has just committed an assault on the Vice President of the United States to simply walk away?

MR. WESTFALL: Objection, form.

THE WITNESS: It would depend on the type of assault.

BY MR. LANE:

Q If an agent of the Secret Service has probable cause to believe that the Vice President of United States of America has just been assaulted, is it consistent or not with Secret Service training to allow the assaultive person who has just committed a crime against the Vice President to walk away from the scene?

A You would have to give me a [65] demonstration, sir, of what kind of assault you're talking about.

Q No. I'm just talking about a crime, okay? You're trained to know when – when the Vice President's security has been compromised, aren't you?

A Yes.

Q Okay. Did you see an assault occur?

A I saw physical touching between the Vice – I'm sorry, between Mr. Howards and the Vice President.

Q Okay. Did you see – you've already said you didn't have probable cause to believe that that physical touching was a crime, correct?

A It's not to the level – from what I saw it wasn't quite to the level of probable cause –

Q Okay.

A – but it's getting closer.

Q Well, do agents of the Secret service allow people who have assaulted the Vice President of the United States to walk away?

A Again –

* * *

[82] and we should monitor him until the PI team can come out to interview him.

Q Okay. And when McLaughlin says he's a person of interest, do you know where he got that information from?

A I'm sorry, sir. Can I go back?

Q Sure.

A He did not say those words. He did not say "person of interest." He just said, "Hey, we've got to follow that guy."

Q Okay. So that's like police officers never get out of their car, they exit their vehicles, is that it?

A Sure.

Q All right. So "we've got to follow this guy." And based on what you saw you agreed with that, didn't you?

A Yes.

Q Okay. And so what happened then?

A We followed him.

Q All right. Did – did the Vice President, to your knowledge, ever ask [83] anybody for help? Did he ever say anything at all to anyone about his interaction with Steve Howards?

A I don't know, sir.

Q Okay. All right. So you're following him. What's he doing?

A He's walking with his – what I assume is his family.

Q Okay. And for how long did – did you follow him?

A I can't give you an exact time, sir, but I would approximate – approximately ten minutes.

Q Okay. What happened then?

A We continued following him.

Q Well, at some point you stopped following him, so what happened?

A Again, at the – at the – I could be wrong on the time sir, but a certain time later, Agent Reichle appeared on the scene and identified himself as Secret Service agent to Mr. Howards and asked if he could talk – politely asked if he could talk to him.

[84] Q Okay. And what happened then?

A Mr. Howards said something to the effect of "F off, or go F yourself, I'm not talking to you," and, again, walking away.

Q You know, that's not anywhere in your report, is it?

A I – I don't think it's in my report, sir, no.

Q Okay. So – so – and it's not in Agent McLaughlin's report either, did you know that?

A I did not read Mr. – Agent McLaughlin's report, so I can't testify as to what is in the report or not in the report.

Q Okay. Well, don't you think that that would be an important fact that if somebody told a Secret Service agent to go fuck themselves or fuck off, that would be in a report somewhere?

A Again, this is just my statement, sir. I'm just putting down the facts that I saw appropriate at the time.

Q I understand, but you didn't put those [85] facts in the report, did you?

A No, I did not.

Q Okay. And you've been schooled just like McLaughlin is schooled by the – in your entire law enforcement career as to how important reports are, aren't you?

A Reports are important, yes.

Q Okay. To – to record details that may be significant down the road, correct?

A Correct.

Q All right. And nowhere in your report do you ever indicate that Steve Howards told anybody to go fuck themselves, do you?

A No, that's not in my report, no.

Q You do write in your report that Reichle made a general question as to you and – or as to Doyle and McLaughlin and you, if the subject had touched Vice President Cheney. At this time you told him, "Yes, I saw it." You wrote that down, didn't you?

A Yes, I did.

Q Okay. And you note that the subject [86] pulled away from Reichle, didn't you?

A Yes, he did.

Q Is there some reason you didn't write in the – in the report that he never said, "Go fuck yourself" or "Fuck you" or anything of that nature?

A Are you asking me is there a reason I didn't put that in there?

Q Yeah.

A When I wrote that statement, sir – I was ordered to write that statement.

Q Who ordered you to?

A The supervisors of the Vice Presidential detail.

Q Okay.

A And I believe reports should be -include facts, but not all of the facts. And I included the facts in the report that I thought were most important. I did not include all of the facts. I didn't include the weather. I didn't include, you know, the shoes he was wearing. I included only the – the most important facts and [87] I left some things out. And that's one of the things that I left out.

Q Well, if Reichle were to testify here later today that the subject matter of the assault was this touching of the Vice President that you saw, then you would understand that any and all information that you have about that touching would be deemed important, wouldn't it?

MR. WESTFALL: Objection, form.

THE WITNESS: Are you asking me if Agent Reichle – that the touch that I saw between Mr. Howards and the Vice President, if –

BY MR. LANE:

Q That was the assault that he was being arrested for, okay?

MR. WESTFALL: Same.

BY MR. LANE:

Q Did you come to – to have an understanding at some point that that is, in fact, what he was being arrested for?

A Yes.

Q When did you come to that understanding?

[88] A Once Mr. – once Agent Reichle made the decision to arrest.

Q Okay. So you knew when you filled out this report that the – the touching, the detail about the touching was going to be very important to your report, didn't you?

A Yes.

Q All right.

A Yes.

Q Okay. And you've testified here today that it was a forceful touching, didn't you?

A I don't think I used the word "forceful."

Q Well, I think you used the term "slapped him," slapped him as – as your descriptive term?

A I said there was some force to it.

Q Okay. That's not in your report either, is it?

A Can I refer to my report, please.

Q Absolutely.

A Thank you.

Q I think it's Exhibit 7.

A Sure.

[89] Q And specifically look at Bates-stamped page 25, the lower right-hand corner.

A Okay.

Q All right. About a third of the way down, "At this time the subject" –

A I have bad handwriting. "White male, green T-shirt."

Q "White male, green T-shirt approached Vice President Cheney and placed his left hand on Vice President Cheney's right shoulder."

A Yes, sir.

Q You didn't say "slapped," did you?

A In my report, I didn't, no. You're right. I said "placed."

Q And you didn't note that there was any particular force involved in the placing of his hand, did you?

A I did not write that, no.

Q Okay. Because it wasn't important, was it?

A No, it's important.

Q Well, you didn't write it, did you?

* * *

EXHIBIT H

COPY

STATEMENT

STATE OF COLORADO)
)
COUNTY OF EAGLE)

I, DANIEL DOYLE, being first duly sworn according to law voluntarily state:

On this 16 day of JUNE, 2006. I was interviewed by _____, who has been identified to me as a Special Agent of the United States Secret Service, Denver, Colorado.

This statement is a voluntary act on my part, made willingly and freely because I desire to tell the truth.

I am _____ years of age and I live at _____ _____.

ON 6-16-06 AT APPROX. 1415 HOUR I WITNESSED A WHITE MALE IN A LIME GREEN TEE SHIRT WALK PAST MY POST TALKING ON A CELL PHONE. THE MALE STATED ON THE CELL PHONE "I'M GOING TO ASK HOW MANY KID'S HE'S KILLED TODAY" AT THAT POINT I NOTIFIED CSU OF THE SITUATION. THE MALE ~~STATED~~ STARTED TO QUICKLY APPROCH THE VP. I BEGAN TO FOLLOW IN HASTE AND STOPPED WHEN I MEET THE DETAIL. I THEN WITNESSED THE MALE APPROCH THE VP AND

HARSHLEY STRUCK THE \P ON THE RIGHT SHOULDER AND WALKED OFF. AN ID TEAM WAS NOTIFIED. SA REICHLE (GUS) APROCHED THE MALE FOR QUESTIONING. THE MALE BECAME BELLIGERENT AND REFUSED TO ANSWER QUESTION AND BEGAN TO PULL AWAY. CSU, SA REICHLE AND MYSELF PLACED THE MALE IN HANDCUFS. SA REICHLE ASK ME TO RETURN AND OBTAIN HIS WIFE'S INFORMATION .

I have read over the foregoing statement, consisting of 2 pages, and I have been given an opportunity to make corrections. All of the facts contained herein are true to the best of my knowledge.

/s/ [Illegible] SPECIAL AGENT
Signature of person making statement)

Sworn to before me this _____ day of _____, 20___.

_____
Special Agent,
U.S. Secret Service

Authority to Administer Oath
Section 303, Title 5, U.S.C.

/s/ [Illegible]

Witnessed by: /s/ Jim Aaron USSS/TSD/PSS

_____

EXHIBIT I

MEMORANDUM OF RECORD

TO		DATE
Special Agent in Charge of Techicnical Security Division		**6/16/06**
INFORMATION RECORDED BY		FILE
Special Agent Daniel Doyle		
SUBJECT		
Arrest of Individual		
CONTACT	OFFICE	TELEPHONE NO.
	TSD/ISB	**301.333.6696**

DETAILS

On June 16, 2006 at approximately 1415 hours (MST) I was performing my duties as an Assistant Lead for the Techicnical Security Division during Vice President Richard B. Cheney's visit to Beaver Creek, Colorado. During the function of my duties the VPOTUS was performing an unscheduled movement through Beaver Creek Village. During the movement I was tailing the VPOTUS protective detail approximately 30 to 40 yards throughout the unscheduled movement. While the VPOTUS was standing in the courtyard of the village talking to small children and a few adults, a white male approximately 50 years of age wearing a lime green tee-shirt and a black ball cap with a orange bill carrying a package passed my location while talking on his cell

phone. The male stated on his cell phone "I'm going to ask him if he's killed any kids today". His angry demeanor caught my attention and I proceeded to notify SA Dan McLaughlin and his partner who are with the U.S. Secret Service Counter Surveillance Unit (CSU), who were siting on a park bench adjacent to my location. I informed SA McLaughlin of what I overheard and asked him to watch the individual in question. SA McLaughlin and his partner began surveillance on the individual in question. I then noticed the same individual in question, with package in hand, walking swiftly and aggressively toward the VPOTUS. I began to pace the suspect male in order to be in position to deescalate any situation that might occur. CSU was just a short distance behind me. As the suspect quickly walked past the detail I stopped my pursuit for fear of startling the detail. I then observed the suspect approach the VPOTUS from the right, with the package in his right hand, lean over a small child and abruptly strike the VPOTUS on the back right shoulder and made a statement which I did not hear. The contact caused the VPOTUS' shoulder to abruptly move forward at which time the VPOTUS turned and looked at the suspect. The suspect quickly moved away from the VPOTUS. CSU and myself began to follow the suspect. SA Gus Reichle (Denver FO), who was working Protective Intelligence (PID) was notified by radio. I noticed CSU was still conducting surveillance on the suspect as

Reichle approached the area. I stopped Reichle and identified the suspect to him. By that time the VPOTUS had moved on toward the motorcade. Reichle asked CSU what the suspect did and CSU stated that he (the suspect) put hands on the VP. Reichle approached the suspect near the top of the steps to question him. CSU and I were standing close behind Reichle. Reichle identified himself as Secret Service and asked the suspect if he could talk to him. The suspect seemed to be very agitated, became verbally belligerent, and began to walk away from Reichle. It appeared the suspect was going to run down the steps but turned and started to walk in the opposite direction. Reichle again asked the suspect to stop so he could speak with him and the suspect became more agitated and began to quickly walk away. At that point Reichle and CSU restrained the suspect and I removed the package from the suspects hands and separated the package from the suspect. A brief inspection of the package showed it contained a shoe box and posed no threat to the protectee or civilians in the area. The suspect asked what he did and Reichle explained that he physically assaulted the VPOTUS. The suspect asked to see his wife and child before he was taken away to which Reichle agreed. Reichle briefly explained to the suspect's wife what took place and asked

me if I would stay behind and obtain the suspect spouse's personal information. The package was returned to the suspect's wife. After I obtained the information I passed it along to Reichle at the arrival / departure area of Park Hyatt Hotel. Reichle asked both CSU agents and myself to write a witness statement and issued us witness forms. After writing my statement I responded to the Eagle County Jail to present Reichle my statement.

EXHIBIT J

MEMORANDUM OF RECORD

TO		DATE
SAIC – Lon Garner, Denver FO		**6/16/06**
INFORMATION RECORDED BY		FILE
SA Virgil "Gus" Reichle Jr., Denver FO		**601.050**
SUBJECT		
Harassment of VPOTUS Cheney		
CONTACT	OFFICE	TELEPHONE NO.
SA Virgil "Gus" Reichle Jr.	**Denver, FO**	**301-860-2935**

DETAILS

On 6/16/06, I was working in a Protective Intelligence (PI) capacity for VPOTUS Cheney's visit to the AEI World Forum Event in Beaver Creek, Colorado. At approximately 2:15 PM, I was notified by radio (Tango Frequency) requesting that I respond to a "situation" near the ski shop, adjacent to the escalators, on the south side of the outdoor ice skating rink. As I was making my way to the aforementioned location, I briefly spoke to SA Oscar Rosales VPD, Site Agent, who was in proximity to VPOTUS Cheney's, Off The Record (OTR) walking movement at the outdoor shopping mall, officially known as Beaver Creek Village. SA Rosales pointed in the general direction of the escalators, and stated that I need to speak to a

PI subject that just had an encounter with VPOTUS Cheney. While making my way to the escalators, I briefly spoke to SA Ted Kolshorn, VPD Lead Advance Agent, who stated that I need to speak with the aforementioned PI subject identified as wearing a ballcap, t-shirt and bluejeans, near the escalators. Continuing to make my way the escalators, I briefly spoke with ASAIC Andy Wurst, VPD supervisor, who asked me where my counterpart was? I stated that he was between Village Hall and the Park Hyatt Hotel, waiting in line for his photo opportunity with VPOTUS Cheney. Continuing to make my way to the escalators, I am contacted by SA Dan Doyle, TSD Advance Agent, who directs my attention to a white male, approximately 50 years of age (YOA), wearing a ball cap, tee shirt and blue jeans located near the escalators. The aforementioned PI subject is walking in a northwesterly direction toward an escalator that would take him in the direction of the Beaver Creek Lodge. As the PI subject nears the escalator, I introduce myself as a U.S. Secret Service Agent, and explained that I would like to speak to him. As a result, the PI subject stated "Fuck you, I don't have to talk to you, and won't talk to you"! The PI subject abruptly turns around and walked back the way he came in a southeastern direction. At this point, SA Doyle and SA's Dan McLaughlin and his Counter Surveillance Unit (CSU) partner, SA A. Daniels are standing next to me. I asked them to briefly explain to me, what transpired. SA Doyle, SA McLaughlin and Daniels

stated that the PI subject had a very brief one sided verbal altercation with VPOTUS Cheney, and went "hands-on" with VPOTUS Cheney that was perceived in an aggressive and threatening manner. I then stated that the "hands-on" scenario as described, and then demonstrated by SA Doyle would be an assault/battery by any legal definition. Therefore, I made the decision to make a probable cause arrest of the PI subject, based upon SA Doyle, SA McLaughlin and SA Daniels brief explanation, The PI subject was continuing to briskly walk away from us in a southeasterly direction, I quickly pursued on foot. I yelled out "Stop, you are under arrest". I pulled out my handcuffs and attempted to place them on the PI subject. The PI subject's demeanor can best be described as "actively aggressive" as he resisted being restrained by handcuffs. With assistance from SA Doyle, SA McLaughlin, and SA Daniels, we were successful in restraining the PI subject. I then conducted a "Pat-down" search for any concealed weapons, and/or identification of the PI subject. As a result, no weapons were located. However, a credit card in his pocket indicated that his name was Steven Howards. The PI subject stated that he has a nine year old child in the vicinity, and can't go to jail. I replied, "Not to worry, we can get Eagle County Social Services to take custody of your child". Within seconds, a woman approached us, and stated "Why is my husband under arrest"? I explained that he was under arrest for physically assaulting/battery of

VPOTUS Cheney. I was very surprised by her response, she shook her head in the affirmative, as if she was not surprised by my allegation. I instructed SA Doyle to get her information and complete a written statement detailing the entire incident, At this point, my counterpart, Deputy Doug Winters of the Eagle County Sheriff's Office is with me. Deputy Winters, SA McLaughlin, SA Daniels and SA Mike Mischloney escorted the prisoner to my vehicle. As Deputy Winters is loading the prisoner in the vehicle, I provide SA McLaughlin and SA Daniels with witness statements. In addition, I instructed them to present them to SA Mischloney ASAP upon completion.

Continuing this same date, at approximately 2:40 PM, Deputy Winters, and I transported the prisoner to the Eagle County Sheriff's Office for processing. I attempt to call my supervisor, ATSAIC Kevin Worthington. However the call is diverted to voicemail. At approximately 3:05 PM, we arrive at the Eagle County Sheriff's Office. I ask Deputy Winters to place the prisoner in a hold room while I attempt to complete numerous phone calls to include ATSAIC Kevin Worthington, ID Duty Desk, SA Ted Kolshorn, Beaver Creek Command Post and the U.S. Attorney's Office, Denver, Colorado.

Continuing this same date, at approximately 3:00 PM, I telephonically contacted AUSA Jim Allison, District of Colorado, Denver, Colorado regarding the situation. AUSA Allison stated that he wants me to draft a complaint for review, and presentation to a federal magistrate

on Monday, 6/17/06. However, he suggested that we contact the Eagle County District Attorney's Office to issue an appropriate state charge in the interim. As a result, the on call Eagle County Deputy District Attorney suggested the state charge of 18-9-111 (Harassment).

Continuing this same date, at approximately 3:45 PM. SAIC Lon Garner and ATSAIC Kevin Worthington, Denver Field Office arrive at the Eagle County Sheriff's Office. Upon arrival, I provided a detailed verbal explanation of the events that transpired pursuant to this incident.

Continuing this same date, Deputy Winters, and I attempted to interview suspect Steven Howards. Suspect Howards was advised of his rights per SSF 1737B. However, suspect Howards elected to remain silent. Suspect Howards was subsequently booked into the Eagle County Jail, pursuant to Colorado Revised Statutes 18-9-111 (Harassment). Suspect Howards wife, Debra Andrews, posted bond in the amount of $500, later that evening. I personally spoke with Debra Andrews at the Eagle County Jail. In doing so, I asked her if she would speak with me regarding todays incident. However, she declined to be interviewed as advised by her husbands legal counsel.

On 6/17/06, SAIC Garner and I, solicited, as well as attained witness statements from a variety of people whom were present at the aforementioned incident.

EXHIBIT K

County Court, Eagle County, Colorado P. O. Box 597 Eagle, CO 81631	
Plaintiff: **PEOPLE OF THE STATE OF COLORADO** v. Defendant: **STEVEN HOWARD**	
Steven Mallory Deputy District Attorney, Fifth Judicial District P. O. Box 295 Eagle, Colorado 81631 Phone: 970-328-6947 Fax: 970-328-1016 Attorney Registration Number: 35936	Case Number: **06 M 406** Division: 1
ORDER TO DISMISS	

THIS MATTER, coming before the court on the People's Motion to DISMISS and the court being fully advised,

IT IS HEREBY ORDERED, that the Motion to DISMISS be granted.

Done this 10 day of June, 2006.

BY THE COURT:

/s/ [Illegible]
Judge Gannett

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 06-cv-01964-CMA-CBS

STEVEN HOWARDS,

Plaintiff,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity; DANIEL MCLAUGHLIN, in his individual and official capacity; DAN DOYLE, in his individual and official capacity; ADAM DANIELS, in his individual and official capacity,

Defendants.

FINAL PRETRIAL ORDER

---

1. DATE AND APPEARANCES

The Final Pretrial Conference in this matter was held before Magistrate Judge Craig B. Shaffer December 12, 2008 at 10:00 a.m. at the Alfred A. Arraj U.S. Courthouse, 901 19th Street, Denver, Colorado.

David A. Lane. Esq.
Althea S. Licht, Esq.
KILLMER, LANE, & NEWMAN, LLP
1543 Champa Street, Suite 400
Denver, Colorado 80202
(303) 571-1000
Counsel for Plaintiff

Richard Westfall, Esq.
Aaron Solomon, Esq.
Hale Friesen LLP
1430 Wynkoop Street, Suite 300
Denver, Colorado 80202
(720) 904-6000
Counsel for Defendants McLaughlin and Daniels in their individual capacities

Sean R. Gallagher, Esq.
Dugan Bliss, Esq.
Hogan & Hartson, LLP
1200 17th Street,
Suite 1500
Denver, CO 80202
Telephone (303)899-7300
Counsel for Defendants
Reichle and Doyle
in their individual
capacities

2. JURISDICTION

This action was brought under the Constitution and laws of the United States, including Article III, Section 1 of the United States Constitution and 42 U.S.C. § 1983. If this Court finds, as Defendants contend, that Defendants were acting under color of federal law instead of state law pursuant to 42 U.S.C. § 1983, the Court has jurisdiction under *Bivens v. Six Unknown Drug Agents,* 403 U.S. 388 (1971). Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 2201. Plaintiff contends that jurisdiction is also conferred by 28 U.S.C. §§ 1343. Plaintiff contends that jurisdiction supporting Mr. Howards' claim for attorney fees is conferred by 42 U.S.C. § 1988.

3. CLAIMS AND DEFENSES

a. Plaintiff:

This is an action for damages against the Defendants for violating Plaintiff Steven Howards'

rights under the First and Fourth Amendments of the Constitution. Mr. Howards alleges that Defendants violated his Fourth Amendment rights when, intentionally, knowingly, recklessly, and with deliberate indifference to his constitutional rights, they subjected him to an intrusive, unjustified, and illegal search and seizure without any reasonable basis to believe he was engaged in criminal activity. Mr. Howards additionally alleges that Defendants violated his First Amendment rights when they retaliated against him by arresting him for his valid exercise of his right to speak freely and right to petition the government.

On June 16, 2006, Plaintiff, Steven Howards was in Beaver Creek, Colorado, as was the Vice President of the United States, Dick Cheney. Mr. Howards was taking his young son to a piano recital, when he saw Mr. Cheney surrounded by people, shaking hands and posing for photographs in an outdoor mall area. Mr. Howards continued to the piano recital, delivered his son, briefly spoke with his wife, and then returned to the area where he had seen Mr. Cheney just minutes before. Mr. Howards saw Mr. Cheney emerge from a store and began, once again, shaking hands and conversing with people. Mr. Howards waited until the conversation ended, and then stepped forward to address the Vice President. Mr. Howards then said to the Vice President, "I think your policies in Iraq are disgusting" or words to that effect, and lightly placed his hand on the Vice President's shoulder in a salutary manner, and then returned to the piano recital to join his wife and kids. This encounter with the Vice

President occurred in plain view of dozens of citizens and numerous Secret Service agents.

Approximately five to ten minutes later Mr. Howards and his other son began to return through the same area. As Mr. Howards and his son approached the area where the initial encounter occurred, they were intercepted by the Defendant Reichle who asked Mr. Howards if he had assaulted the Vice President. Mr. Howards, in shocked amazement, denied that he had assaulted the Vice President. At that point, Mr. Howards, and in the presence of his young son, was placed in handcuffs and taken to the Eagle County jail where he was searched and detained for several hours.

Although the Defendant Reichle told Mr. Howards that he was going to be charged with assaulting the vice-president, the Defendants instructed the Eagle County, Colorado Sheriff's Department to issue Mr. Howards a summons for harassment under Colorado State Law. On July 6, 2006, the Eagle County District Attorney's office moved to dismiss all charges. On July 10, 2006, the state court dismissed all charges.

At no time during these encounters did Steven Howards ever violate any law, federal, state or local. Mr. Howards was arrested without probable cause to believe that he had committed any offense whatsoever. Mr. Howards was arrested in retaliation for his having exercised his First Amendment protected free speech right to speak out to the Vice President and in

retaliation for his having exercised his First Amendment right to petition his government.

Mr. Howards asserts three claims for relief against the Defendant: 1) unlawful seizure in violation of the Fourth Amendment; 2) unlawful search in violation of the Fourth Amendment; 3) retaliation for exercise of free speech in violation of the First Amendment. All claims are brought under 42 U.S.C. § 1983.

b. Defenses of Defendants:

1. Defendants Dolye and Reichle

On June 16, 2006, United States Secret Service Agents Gus Reichle and Daniel Doyle were assigned to protect the Vice President of the United States during a public appearance. Agent Reichle, acting on instinct and years of training as a state patrolman and a Secret Service Agent, made an instantaneous decision to protect the Vice President. Rather than permitting Plaintiff Howards to flee the scene of his encounter with Vice President Cheney, Agent Reichle stopped him after having been informed by fellow agents, including Agent Doyle, of an extraordinary incident in which Howards, who had behaved suspiciously, followed the Vice President, and carried a large bag containing then-unknown items, raced furtively toward and slapped the Vice President on the back. Howards angrily refused to speak with Agent Reichle about the incident, instead stating "fuck you, I don't have to talk to you," and then began

to flee the scene, at which time Agent Reichle arrested him, though Howards resisted arrest.

Agent Doyle was named as a defendant for his decision to *relay* to Agent Reichle what he had witnessed about the incident with the Vice President. Prior to the confrontation with the Vice President, Agent Doyle overheard Mr. Howards speaking into a cell phone stating that he was going to ask the Vice President "how many kids he's killed today." Agent Doyle then watched Howards follow and then make a bee line towards the Vice President, slap him on the back, and apparently say something to him. Notably, at the time of Howards' arrest, neither Reichle nor Doyle knew what Howards had said to the Vice President. Agent Doyle also assisted when Howards resisted arrest.

Based upon the totality of these circumstances, Agents Reichle and Doyle had probable cause to arrest Howards, and they are therefore entitled to qualified immunity. This case involves the central mission of the United States Secret Service – to protect the President and Vice President of the United States from harm – and whether a Court or jury should second guess a Secret Service Agent's concern over the consequences of allowing a potentially dangerous man to remain, uncontrolled, within the blast-radius of the Vice President.

2. Defendants Daniels and McLaughlin

Adam Daniels and Daniel McLaughlin are United States Secret Service agents who were assigned to protect the Vice President of the United States during a public appearance. While operating in an undercover capacity, a fellow agent requested that Daniels and McLaughlin observe Howards after Howards had been overheard making a cell phone call in which he stated that he was going to ask the Vice President "how many kids he killed today." Daniels and McLaughlin followed Howards in an undercover capacity and observed him make physical contact with the Vice President.

When Howards was confronted minutes later regarding this encounter with the Vice President by agent Virgil Reichle, he lied about touching the Vice President and became confrontational and hostile. Agent Reichle made the decision to arrest Howards. The sole involvement of Daniels and McLaughlin, who had been undercover during this entire time, involved touching Howards' arms in an attempt to calm him down during the arrest. While denying that he technically resisted arrest, Howards admitted in his deposition that he was "irritated" and confrontational during his encounter with agent Reichle.

Daniels and McLaughlin did not personally participate in Howards' arrest in any meaningful way. There was, moreover, probable cause for agent Reichle to arrest Howards. Thus, any participation by Daniels and McLaughlin was also supported by

probable cause. Furthermore, to the extent probable cause to arrest Howards did not exist, Daniels and McLaughlin reasonably relied on Reichle's arresting decision and were thus protected by the fellow officer rule. Finally, even in the absence of probable cause or the protection afforded by the fellow officer rule, a reasonable officer could have believed that Reichle had probable cause to arrest Howards and that their limited action was objectively reasonable, especially given the heightened standard for agents protecting the President and the Vice President under 18 U.S.C. § 3056.

Neither Daniels nor McLaughlin searched Howards and Reichle's search of Howards was a proper search incident to Howards' arrest. Finally, Daniels and McLaughlin did not violate Howards' First Amendment rights because probable cause existed to arrest Howards for a variety of offenses, because Daniels and McLaughlin were not aware of what Howards said to the Vice President until well after he was arrested, and because Daniels and McLaughlin reasonably relied on. Reichle's arresting decision. Moreover, Howards cannot provide specific and concrete evidence of a retaliatory motive on the part of Daniels and McLaughlin.

4. STIPULATIONS

a. At all pertinent times mentioned herein, Plaintiff Steve Howards was a citizen of the United States of America and a resident of Colorado.

b. At all pertinent times mentioned herein, Defendants were employed as Secret Service agents and were acting within the scope of their duties and employment, under color and authority of federal law, and in their official capacities as United States Secret Service agents.

5. PENDING MOTIONS

Plaintiffs Objection to Magistrate Judge Craig B. Shaffer's Denial of Plaintiff's Renewed Motion for United States Marshals to Serve Subpoena and thereby denying Plaintiff's request to depose Vice President Dick Cheney **[153]** filed November 10, 2008.

Defendants Reichle and Doyle's Motion for Summary Judgment **[155]** filed November 21, 2008.

Defendants Daniels and McLaughlin's Motion for Summary Judgment **[156]** filed November 21, 2008.

6. WITNESSES

a. Plaintiff's witnesses:

(1) Will call non-expert witnesses:

See attached Witness List.

(2) May call non-expert witnesses:

See attached Witness List.

(3) Plaintiff does not anticipate presenting any testimony of non-expert witnesses by deposition transcript.

(4) Disclosure of expert testimony: none.

b. Defendants' witnesses:

(1) Will call non-expert witnesses:

See attached Witness List.

(2) May call non-expert witnesses:

See attached Witness List.

(3 The Defendant may present the testimony of may call witnesses by deposition transcript.

(4) Disclosure of expert testimony: none.

7. EXHIBITS

a. (1) Plaintiffs exhibits: See attached Exhibit List.

(2) Defendants' exhibits: See attached Exhibit List.

b. Copies of listed exhibits must be provided to opposing counsel and any *pro se* party no later than five days after the final pretrial conference. The objections contemplated by Fed. R. Civ. P. 26(a)(3) shall be filed with the clerk and served by hand delivery or facsimile no later than 11 days after the exhibits are provided.

8. DISCOVERY

Discovery has been completed with the exception of the potential deposition of Vice President Richard Cheney.

9. SPECIAL ISSUES

Application of the Agreed Protective Order [59] to protect certain confidential information.

10. SETTLEMENT

The undersigned counsel for the parties hereby certify that:

a. Counsel for the parties discussed in good faith the settlement of the case.

b. The participants in the settlement discussion included counsel for the parties. The parties were unable to reach a settlement.

c. The parties were promptly informed of all offers of settlement.

d. Counsel for the parties do not intend to hold future settlement conferences.

e. It appears from the discussion by all counsel that there is **no** ~~little~~ possibility of settlement.

f. No future Settlement Conference is scheduled.

g. Counsel for the parties considered ADR in accordance with D.C.COLO.L.CivR.16.6.

11. OFFER OF JUDGMENT

Counsel and any pro se party acknowledge familiarity with the provisions of rule 68 (Offer of Judgment) of the Federal Rules of Civil Procedure. Counsel have discussed it with the clients against whom claims are made in this case.

12. EFFECT OF FINAL PRETRIAL ORDER

Hereafter, this Final Pretrial Order will control the subsequent course of this action and the trial, and may not be amended except by consent of the parties and approval by the court or by order of the court to prevent manifest injustice. The pleadings will be deemed merged herein. This Final Pretrial Order supersedes the Scheduling Order. In the event of ambiguity in any provision of this Final Pretrial Order, reference may be made to the record of the pretrial conference to the extent reported by stenographic notes and to the pleadings.

13. TRIAL AND ESTIMATED TRIAL TIME; FURTHER TRIAL PREPARATION PROCEEDINGS

1. Trial is to a jury.
2. Trial is expected to take eight days.
3. Trial is to take place in Denver at the Alfred A. Arraj United States Court House. No trial date has been set.

DATED at Denver, Colorado, this 12th day of December, 2008.

BY THE COURT:

s/ Craig B. Shaffer
Craig B. Shaffer
United States Magistrate Judge

APPROVED:

s/ David A. Lanes
David A. Lane. Esq.
Althea S. Licht, Esq.
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Telephone (303)899-7300
Counsel for Defendants Reichle and Doyle in their individual capacities

WITNESS LIST FORM

Judge Christine M. Arguello

Case No.
06-cv-01964-CMA-CBS

Date: *December 5, 2008*

Case Caption:
Howards v. Reichle et al.

Plaintiff's Witness List

Will Call Witnesses (*name & summary of testimony*)	*Estimated Time for Examination* Direct	Cross
1. ***Steven Howards*** *– Mr. Howards is the plaintiff in this case and will testify about matters relevant to the subject matter of this litigation, including, but not limited to, his interaction with Vice President Cheney, the speech that led to his arrest, and his economic and non economic damages. Mr. Howards will testify in person.*		*1.0.5*

Will Call Witnesses (*name & summary of testimony*)	*Estimated Time for Examination* Direct	Cross
1. ***Richard Cheney*** *– Plaintiff's encounter with, and comments to, Mr. Cheney on June 16, 2006 form the basis of this litigation, and Mr. Cheney may have information relevant to the subject matter of this litigation.*		*1.0.5*

2. ***Coby Howards*** – *Coby is the son of Plaintiff, was with the Plaintiff on June 16, 2006, and may have information relevant to the subject matter of this litigation.* .5.25

3. ***Deborah Andrews*** – *Ms. Howards is the wife of Plaintiff, was with the Plaintiff on June 16, 2006, and may have information relevant to the subject matter of this litigation, including the effect that Plaintiff's arrest has had upon him.* .5.25

4. ***Steven Mallory, Esq.,*** – *Mr. Mallory was the assistant district attorney responsible for the prosecution of the harassment complaint filed against Plaintiff and may have information relevant to the subject matter of this litigation.* .5.25

5. ***Doug Winters*** – *Detective Winters participated in the arrest of Plaintiff on June 16, 2006 and may have information relevant to the subject matter of this litigation.*

6 ***Daniel McLaughlin*** – *Mr. McLaughlin is a defendant in this case. He participated in the arrest of Plaintiff on June 16, 2006 and may have information relevant to* .5.25

the subject matter of this litigation.

7. ***Adam Daniels*** *– Mr. Daniels is a defendant in this case. He participated in the arrest of Plaintiff on June 16, 2006 and may have information relevant to the subject matter of this litigation.* .75.25

8. ***Kristopher Mischoloney,*** *– Mr. Mischoloney was a defendant in this case. He participated in the arrest of Plaintiff on June 16, 2006 and may have information relevant to the subject matter of this litigation.* .75.25

9. ***Virgil D. Reichle*** *– Mr. Reichle is a defendant in this case. He participated in the arrest of Plaintiff on June 16, 2006 and may have information relevant to the subject matter of this litigation.* .5.25

10. ***Daniel Doyle*** *– Mr. Doyle is a defendant in this case. He participated in the arrest of Plaintiff on June 16, 2006 and may have information relevant to the subject matter of this litigation.* 1.0.25

11. ***Charles Durkin*** *– Mr. Durkin was Vice President Cheney's Executive aid. He witnessed the events leading up to and the* 1.0.25

arrest of Plaintiff on June 16, 2006 and may have information relevant to the subject matter of this litigation.

12. ***David Bohrer*** *– Mr. Bohrer was Vice President Cheney's photographer. He witnessed the events leading up to and the arrest of Plaintiff on June 16, 2006 and may have information relevant to the subject matter of this litigation.* .5.25

13. ***Mike Lee*** *– Mr. Lee witnessed the events leading up to and the arrest of Plaintiff on June 16, 2006 and may have information relevant to the subject matter of this litigation.* .5.25

14. ***Any witness endorsed by Defendant.***

15. ***Any witness necessary for rebuttal.*** 5.25

WITNESS LIST FORM

Judge Christine M. Arguello

Case No.
06-CV-01964-CMA-CBS

Date: _____

Case Caption:
Steven Howards v. Virgil D. "Gus" Reichle, et al.

Defendants' Witness List

Will Call Witnesses	*Estimated Time for Examination* Direct	Cross
1. Virgil D. "Gus" Reichle The events surrounding Plaintiff's arrest.	___1.5___	___.75___
2. Dan Doyle The events surrounding Plaintiff's encounter with the Vice President and Plaintiff's arrest.	___1___	___.5___
3. Daniel McLaughlin The events surrounding Plaintiff's encounter with the Vice President and Plaintiff's arrest.	___1___	___.5___
4. Adam Daniels The events surrounding Plaintiff's encounter with the Vice President and Plaintiff's arrest.	___1___	___.5___

5. Steven Howards The events surrounding Plaintiff's encounter with the Vice President, Plaintiff's arrest and Plaintiffs' damages.	1.5	1

May Call Witnesses	*Estimated Time for Examination* Direct	Cross
1. David Bohrer Plaintiff's encounter with the Vice President.	.5	.25
2. Charles Durkin Plaintiff's encounter with the Vice President.	.5	.25
3. Michael Lee Plaintiff's encounter with the Vice President.	.5	.25
4. Kristopher Mischloney Plaintiff's encounter with the Vice President.	.5	.25
5. Oscar Rosales Plaintiff's encounter with the Vice President.	.5	.25
6. Edward Kolshorn Plaintiff's encounter with the Vice President.	.5	.25

7. Douglas Winters The events surrounding Plaintiff's arrest.	___.5___	___.25___
8. Andrew Wurst Plaintiff's encounter with the Vice President.	___.5___	___.25___
9. Deborah Andrews The events surrounding Plaintiff's arrest and Plaintiffs' damages.	___.5___	___.25___

10. Any witnesses endorsed by defendant

11. Any witnesses necessary for impeachment or rebuttal

Judge Christine M. Arguello

Case No. 06-cv-01964-CMA-CBS Plaintiff's Exhibits Page 1 of 23
Steven Howards v. Virgil D. "Gus" Reichle, et al.

Exhibit No.	Brief Description	Offer	Stip	IN	OUT	Objections/Remarks
1.	June 16, 2006 – Summons and Complaint					
2.	June 17, 2006 – Bohrer Statement					
3.	June 16, 2006 – Daniels Statement					
4.	June 16, 2006 – Doyle Statement					
5.	June 16, 2006 – Durkin Statement					
6.	June 16, 2006 – McLaughlin Statement					
7.	June 16, 2006 – Reichle Memo of Record					
8.	June 16, 2006 – Mischoloney Memo of Record					
9.	June 16, 2006 – Doyle Memo of Record					
10.	June 16, 2006 – Winters Incident Report					
11.	June 16, 2006 – McWilliam Incident Report					
12.	June 16, 2006 – Eagle County Booking Documents					
13.	July 6, 2006 – Motion to Dismiss Criminal Case					
14.	July 10, 2006 – Signed Order Dismissing Criminal Case					
15.	DVD of each defendant's demonstrations of Plaintiff's interaction with Vice President Cheney taken from videotape					

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	depositions of the parties and other witnesses.					
16.	DVD 1of 2 of McLaughlin Deposition taken November 27, 2007					
17.	DVD 2 of 2 of McLaughlin Deposition taken November 27, 2007					
18.	DVD 1 of 2 of Daniels Deposition taken November 27, 2007					
19.	DVD 2 of 2 of Daniels Deposition taken November 27, 2007					
20.	DVD 1 of 1 of Mischoloney Deposition taken November 27, 2007					
21.	DVD 1 of 1 of Reichle Deposition taken November 27, 2007					
22.	DVD 1 of 2 of Doyle Deposition taken December 7, 2007					
23.	DVD 2 of 2 of Doyle Deposition taken December 7, 2007					
24.	DVD 1 of 1 of Durkin Deposition taken December 7, 2007					
25.	DVD 1 of 1 of Bohrer Deposition taken December 14, 2007					
26.	DVD 1 of 1 of Winters Deposition taken February 25, 2008					

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Judge Christine M. Arguello

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Steven Howards v. Virgil D. "Gus" Reichle, et al.

Exhibit No.	Brief Description	Offer	Stip	IN	OUT	Objections/Remarks
1	Howards Summons (HOWARDS 0001)					
2	Eagle County Motion to Dismiss (HOWARDS 0002-3)					
3	Eagle Country Order Granting Motion to Dismiss (HOWARDS 0004)					
4	Incident/ Investigation Report (HOWARDS 006-12)					
5	Affidavit in Support of Warrantless Arrest (HOWARDS 00013)					
6	Statement - Durkin (HOWARDS 00014-16)					
7	Statement - Bohrer (HOWARDS 00017-19)					
8	Statement - McLaughlin (HOWARDS 00020-23)					
9	Statement - Daniels (HOWARDS 00024-27)					

10	Statement - Doyle (HOWARDS 00028-30)					
11	Memorandum of Record - Doyle (HOWARDS 00031)					
12	Memorandum of Record - Reichle (HOWARDS 00032-33)					
13	Memorandum of Record - Mischloney dated 6/16/06 (HOWARDS 00034)					
14	Correspondence dated 6/16/06 from Christi Sanders to Eagle County Law Enforcement (HOWARDS 00035)					
15	Eagle County Sheriff's Office - Evidence List (HOWARDS 00036)					
16	Eagle County Sheriff's Office - RAP Sheet (HOWARDS 00037-39)					
17	NCIC and CBI Records (HOWARDS 00040-44)					
18	Correspondence dated 4/26/07 from the United States Secret Service to David Lane (HOWARDS 00049-50)					
19	E-mail from Peter McCauley dated June 22, 2006 (HOWARDS 00051-53)					

20	Media Coverage of Plaintiff's arrest (HOWARDS 00054-57)					
21	Photos (HOWARDS 00067-69)					
22	Memorandum of Record - Reichle (HOWARDS 00070-71)					
23	Memorandum of Record - Mischloney dated 6/16/06 (HOWARDS 00072)					
24	Memorandum of Record - Mischloney dated 10/6/06 (HOWARDS 00073)					
25	Statement - McLaughlin (HOWARDS 00074-77)					
26	Statement - Daniels (HOWARDS 00078-81)					
27	Memorandum of Record - Doyle (HOWARDS 00082)					
28	Statement - Doyle (HOWARDS 00083-85)					
29	Statement - Bohrer (HOWARDS 00086-88)					
30	Statement - Durkin (HOWARDS 00089-91)					
31	Protective Operations Activity and Personnel Report prepared by Verzi (HOWARDS 00092-93)					

32	Correspondence from Denver FO to Headquarters, Subject: Notification of Arrest - Steven Allen Howards (HOWARDS 00094-95)					
33	Email dated 6/22/06 from ID4 to DEN, Subject: 127-671-37263, Howards (HOWARDS 00096-98)					
34	Correspondence from Denver Field Office to Intelligence Division, Subject: Steven Allen Howards (HOWARDS 00099-105)					
35	Email dated 6/23/06 from ID4 to DEN, Subject: 127-671-37263, Howards**Recalled (HOWARDS 00106)					
36	Warning of Rights (HOWARDS 00107)					
37	Eagle County Sheriff's Office- Mug Shot (HOWARDS 00108)					
38	Howards Medical Records (HOWARDS 0109-122)					
39	January 18, 2008 New York Times Article					
40	October 2006 Democracy Now! Interview					

41	Other Media Coverage of Howards' Arrest or This Case					
42	Any Exhibits Listed by Plaintiff					
43	Any Exhibits Necessary for Rebuttal					

EXHIBIT A – HOWARDS DEPO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Case No. 06-CV-01964-WYD-CBS

VIDEO DEPOSITION OF: STEVEN HOWARDS
EXAMINATION DATE: November 19, 2007

STEVEN HOWARDS,

Plaintiff,

vs.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity; KRISTOPHER MISCHLONEY, in his individual and official capacity; DANIEL MCLAUGHLIN, in his individual and official capacity; DAN DOYLE, in his individual and official capacity; ADAM DANIELS, in his individual and official capacity.

Defendants.

PURSUANT TO NOTICE, the video deposition of STEVEN HOWARDS was taken at 9:04 a.m. on November 19, 2007, at 1430 Wynkoop Street, Suite 300, Denver, Colorado, before Pamela Meade Hansen, Certified Realtime Reporter and Notary Public in and for the State of Colorado, said deposition being taken pursuant to the Federal Rules of Civil Procedure.

* * *

[22] A I believe there was a photographer.

Q So, during that minute or couple of minutes between the time you actually saw him for the first time and decided to approach him, can you give us some idea about how many people came up and either spoke to the Vice President or shook his hand or asked for an autograph?

A Before or afterwards?

Q Before – before you approached him.

A I wasn't counting. I don't know. Several, but I don't know whether it was three or five or 10.

Q Were they –

A I wasn't the first person to shake his hand. I wasn't the first person to approach him, let me put it that way.

Q Were – were they adults or children or a mix?

A I didn't – I didn't pay attention. I know – I know there were adults. Whether there were children there as well, I don't know.

Q So, at some point in time, though, you decide to approach the Vice President, correct?

A Correct.

Q Okay. And at the time you decided [23] to move forward and approach the Vice President, how far was he from you?

A 10 feet, 15 feet.

Q Where was Jonah at that time?

A You know, actually, I'm – I was wrong. I was accompanying Koby to the recital, and when I saw the Vice President, I stopped and Koby kept on because we were close enough for him to know where we were, and Koby continued on to the recital. And then after I saw the Vice President, I continued on to make sure Koby got where he was – where he was going.

Q Okay. So, you encounter the Vice President. You're – you're pretty – you're pretty close to where the recital is, so Koby goes on to the recital.

A Correct.

Q Why didn't you accompany Koby to the recital?

A Well, because I was focused on talking to the Vice President and I lost track of Koby.

Q Okay. Did you – did you become confused and lose track of him, or did you say, Why don't you go on to the recital, I'll catch up?

[24] A No. I think I was – I don't recall. I – I think I stopped, spoke with the Vice President, and

Koby just wandered off, just continued on. We weren't very far from where he was going.

Q Okay. So, let me – let me take you back to my questions. I want to now sort of walk through –

A Sure.

Q – your decision to approach the Vice President and – and what happened then. Why did you decide to approach the Vice President?

A Because I had something to say to him.

Q And what did you want to say to him?

A I wanted to tell him that I thought his policies in Iraq were disgusting.

Q Why was it that you wanted to say that?

A Because that's the way I felt, and I wanted to express my First – I wanted to utilize the First Amendment to express my opinion.

Q Did you expect to engage in a discussion with the Vice President?

A No.

[25] Q Had you heard anybody – during the time that you were observing people interacting with the Vice President, had you heard anybody else raise Iraq or any other political or social issue with the Vice President?

A I wasn't listening.

Q Were you – were you close enough to hear conversations, or were you far enough away you couldn't hear those conversations?

A I – I just wasn't – was I close enough? I don't remember how far I was away – how far I was away. I just wasn't – I wasn't listening.

Q So at the time you decided to move towards the Vice President, I think you said you were 10 or 15 feet away from him, right?

A As best I can recall.

Q Were there any people in between you and the Vice President?

A I don't recall.

Q Okay. So you don't recall having to walk around anybody to get up to the Vice President?

A I – I don't recall that, no.

Q How many steps do you think it took you to go from where you were to where the Vice [26] President was? I know – understand you weren't counting steps, but if you could give us some idea about how long it took you to get there.

A A few seconds.

Q So, you start moving toward the Vice President, correct?

A Correct.

Q Can – can you walk me through what then happened? As you start moving forward, what – what then happens?

A The Vice President emerged from this grocery and began shaking hands and conversing with people. I waited until the conversation – their conver- – their conversations were done, and I stepped forward and spoke with the Vice President.

Q What did you say to the Vice President?

A "Your policies in Iraq are disgusting."

Q How did he respond?

A He said, "Thank you."

Q Did you shake his hand when you approached him?

A No.

Q Okay. Did you touch him in any way?

[27] A When I left, I did.

Q Okay. So, walk me through how that went. You approach the Vice President. You – you say that you disagree – that his policies in Iraq are disgusting.

A Correct.

Q What – what was the next thing that happened?

A He said, "Thank you."

Q After he said, "Thank you," what's the next thing that happened?

A I left.

Q At what point did you touch the Vice President?

A As I was leaving.

Q Okay. And explain to me how that occurred. What happened?

A As I walked away, I touched him on the shoulder, on his right shoulder, with an open hand.

Q Had – did you shake his hand with – at all?

A No.

Q So, you didn't shake hands. You actually just touched his right shoulder.

[28] A Correct.

Q Did you touch his right shoulder with your left hand?

A Yes.

Q And you say your palm was open?

A Correct.

Q How forceful was it?

A It was a pat.

Q And when you touched him, I believe you were reported in at least one newspaper to have noticed that he seemed to have a silk suit on, right?

A That is correct.

Q He was wearing silk. What was the Vice President wearing at that time?

A He was wearing kind of a natty silk jacket.

Q Did he respond at all to your touching, him?

A I don't know. I left.

Q Okay. He didn't say anything to you?

A No.

Q He didn't make any movements in response to that?

[29] A No.

Q Any facial expressions at all?

A No. Again, I touched him and I left, so my back was to him at that point.

Q So, you touched him and then you turned around 180 degrees and moved away.

A No.

Q Is that right?

A I touched him like this (indicating) and I moved on.

Q Okay. So you walked – you walked away from him, though.

A Correct.

Q In the time that you observed people interacting with the Vice President, did you see anyone else touch him?

A Absolutely. Yes.

Q Did anybody shake his hand?

A Yes.

Q Okay. What other touching occurred other than the shaking of hands?

A There were hugs, there were group photos, there were all sorts of things.

Q At the time that you told the Vice President that you disagreed with his policies in [30] Iraq and you touched him on his left shoulder, do you recall anyone standing around you or the Vice President at that point?

A I don't recall, no.

Q And then when you say you – you left the area, did you continue to walk past the Vice President?

A No.

Q Okay. Because, you know, presumably you approached the Vice President head on.

A Correct.

Q You talked with him. When you moved away, can you maybe draw on our Exhibit 1, on the map, your – your route to the Vice President and then your route away, just so that I can get a feel for sort of how that –

A I approached him. The conversation was done. I pat him on the shoulder, and I walk that way.

Q Okay. Would you mind drawing the routes on our exhibit, just so that we've got a record of it?

A (Deponent complied.)

Q Okay. So, after you encounter the Vice President, you continue to walk past him, [31] correct?

A Correct.

Q At the time that you actually encountered the Vice President, just so that I'm clear, Koby you believe was in his recital.

A Correct.

Q And Joshua –

A Jonah.

Q Jonah, I'm sorry. Jonah was with your wife.

A Correct.

Q Do you know where they were at that point?

A In the recital, in the recital hall.

Q So, after you encountered the Vice President and you started to move away, what's the next thing that you did?

A I mean, the next thing I did was I went to see where Koby was to make sure that Koby got where he was supposed to go.

Q So you went to the – was it a hall where the recital was occurring?

A Yes.

Q How long did you – did you go inside that building?

[32] A Yes.

Q To make sure that he was there?

A Correct.

Q And I assume he was there, correct?

A Correct.

Q Once you realized that he was there, what did you do next?

A I told my wife – I believe I told my wife that I had spoken with the Vice President, and she said – I don't remember what she responded and then – and then she asked me if I'd take my younger son back to the condo.

Q You don't recall anything about the conversation you had with your wife?

A No.

Q Did you – do you recall telling her what you said to the Vice President?

A I don't recall.

Q So, did you then start to go back to the condo?

A Correct.

Q Okay. And you had Jonah with you at that point?

A Correct.

Q Did you come out the same way that [33] you had gone into –

A Yes.

Q – the hall? When you – when you exited the hall –

A I – I followed the exact same steps – I'm sorry, I didn't let you finish.

Q That's fine.

A All right.

Q Why don't you tell me what you did. You followed the exact same steps?

A Followed the exact same steps because the way Beaver Creek is laid out, there's only one place – only one way to get from Point A to Point B and back again, so I – I repeated my steps.

Q So you walk outside the building, back to the daylight.

A Right.

Q Where was the Vice President at that point?

A I believe he had rotated counter-clockwise around the mall, and he was – and I believe he was taking pictures with other families, and I say that because I remember seeing that at some point, and I believe that's when I saw that. [34] I'm not sure, but I believe that's when I saw that.

Q Okay. But he was still within eyesight of you, correct?

A As I recall, yes.

Q Okay. Approximately – when you – when you – when you left the building and came back out into the daylight, approximately how far away was the Vice President, if you can recall?

A 50 – I don't know, 25 yards, 50 yards.

Q Okay. Now, at the time – let me – let me take you back to the time that you entered that plaza. You were carrying a bag, right?

A Correct.

Q What was in the bag?

A Shoes.

Q Can you describe the bag for me? I mean, what did it look like and –

A A plastic bag.

Q Was it like a grocery store bag?

A It was a white plastic bag. I – I don't know. It was a white plastic bag.

Q And there were shoes in it?

A Correct.

Q What kind of shoes?

[35] A Just leather casual shoes.

Q Were they in a box or were they loose?

A They were in a box.

Q So, inside a shoebox, correct?

A Correct.

Q Anything else in the bag?

A No.

Q At the time you approached the Vice President, do you recall what hand the bag was in?

A No.

Q How were you dressed that day, if you can recall?

A Casual, jeans and a T-shirt.

Q So, you go into the – back into the – into the concert hall, or whatever it is, and you pick up Jonah, and you come back out. Did you still have the bag with you?

A Yes.

Q Were you holding hands with Jonah or I was he walking next to you? Where was he physically in relation to you?

A He was alongside of me.

Q So, once you come out of the building what's the next movement that you made?

[36] A I believe I saw the Vice President, and I was trying to show Jonah the Vice President since he had not seen him.

Q And how did you go about doing that?

A I didn't because Jonah disappeared.

Q Where did Jonah go?

A I don't know.

Q How could you have lost Jonah as you exited that building?

A Excellent question. He's a – he's a – at that point he was eight years old, and it's hard to keep your – hard to keep your eyes on an eight-year-old sometimes.

Q Is it fair to say that you were watching the Vice President when he exited?

A It's fair to say I glanced at the Vice President when – when we – when we began leaving.

Q Do you have any idea where Jonah went?

A At that particular time, no.

Q So, when you – when you exited the building, you see the Vice President. When did you first notice that Jonah wasn't with you?

A When I saw the Vice President.

[37] Q Okay. What did you do next?

A I looked for Jonah.

Q How did you go about doing that?

A I glanced around. I just glanced around to see where he was.

Q Did you find him?

A No.

Q So, what's the next thing you did after that?

A I was confronted by – by Gus.

Q That's – that's Agent Reichle, correct?

A Agent Reichle.

Q Okay. Where were you standing when Agent Reichle approached you?

A Someplace between the two escalators, but I don't remember exactly where.

Q Okay. So, you had – you had walked out of a building. Do you – do you recall how far you went before Agent Reichle approached you?

A I don't. I'd guess it was – I don't recall. 20 feet, 30 feet, but I just don't recall.

Q At the time that Agent Reichle approached you, were you standing still or moving?

[38] A I was moving until he approached me.

Q And you were moving toward an escalator?

A At that point I was – I was standing there trying to figure out where Jonah had gone.

Q Okay. But you had – you had moved to a certain point and then you stopped?

A Yeah. Yes.

Q And that's when Agent Reichle approached you?

A Yes.

Q Did – do you know where the Vice President was at the point that Agent Reichle approached you?

A Again, I believe he was to my right, counterclockwise, more towards the middle of the mall, taking pictures. I remember he was there at some point.

I believe that's when – I believe that's when I saw him there.

Q So at the point that Agent Reichle approached you, were there any other people around you?

A I don't recall.

Q So, Agent Reichle approaches you. [39] What – what's the first thing that happened when he approached you?

A He showed me his Secret Service badge.

Q Did he say anything?

A He asked if he could talk with me.

Q He identified himself as a Secret Service agent, correct?

A I don't recall. He showed me his badge.

Q But you don't recall him saying, I'm a United States Secret Service agent?

A I don't recall.

Q So he shows you the badge and he asks if he can speak with you.

A Right.

Q How did you respond to that?

A I told him no, he couldn't.

Q Did you say anything other than that?

A No.

Q Okay.

A Not that I recall.

Q Okay. Agent Reichle has indicated in his report that you said words to the effect of, [40] and let me – let me get this right because I want to make sure of the exact words. You said words – this is what he – he reports that you said. He reports you said, "Fuck you. I don't have to talk with you and I won't talk with you." Do you recall saying that?

A I did not say that.

Q Did you use the word "fuck" at any time with Agent –

A I never swore at Agent Reichle.

Q Okay. But you do recall telling him that you did not have to talk to him?

A I told him I would not – he asked me if I could talk with him, and I said, no, he couldn't.

Q How did he respond to that?

A He – he – he pursued me with questions.

Q Okay. So, after that – after you had that initial encounter with Agent Reichle, you began moving again, correct?

A If I did, it wasn't by more than a few feet.

Q Okay.

A If I did, it was to see if I could [41] figure out where my son was.

Q Okay. And then Mr. – and then Agent Reichle approached you a second time, correct?

A Correct.

Q What happened then?

A He – he asked – he said – he asked me if I had assaulted the Vice President.

Q How did you respond?

A "No."

Q What's the next thing that happened?

A He asked me again, he asked me a similar question again, and he was impeding my ability to move – to move. He stepped in front of me. And I don't remember the exact question, but I remember responding to him and pointing my finger at him and telling him, and I remember this specifically, I didn't assault the Vice President, but I did tell him the way I felt about the war in Iraq, and if you don't want other people sharing their opinions, you should have him avoid public places. Those were my words.

Q Now, the – when you – when you initially responded to Agent Reichle that you would not speak with him, why wouldn't you speak with him?

A I didn't – I – I had no [42] obligation.

Q Whether or not you had an obligation, why wouldn't you speak with him?

A Because I was – I was on vacation with my son.

Q Were you angry at that point?

A Was I angry at that point. I was irritated that he approached me.

Q So, you start to move on, and then he actually gets in front of you and impedes your movement, correct?

A It was clear that he wasn't going to leave me alone.

Q Right. So, you told him that you had not assaulted the Vice President.

A Correct.

Q Did he ask you any additional questions?

A I don't recall any additional questions at that point.

Q Is it fair to say that at that point you were more agitated than you had been seconds earlier when you initially contacted Agent Reichle?

A I was irritated.

Q What's the next thing that happened?

[43] A I – I started to walk away because I was still looking for my son, and at which point I heard

Agent Reichle behind me talking with other agents, and I heard him ask, I believe it was Mr. Winters, if he had seen me – at some – if he had seen me touch the Vice President. And I remember – and there were several agents he was asking this question, and I believe Mr. Winters or some of the other agents asked him whether he had seen me touch the Vice President, and there was some degree of – it's – it appeared as though no one had seen that occur. I believe he may have asked me at the time – well, and I'm trying to remember. At some point he said to me – I believe there actually – he also asked me if I touched the Vice President.

Q How did you respond to that?

A I believe I said I hadn't.

Q Okay. And that wasn't truthful, was it?

A That wasn't accurate.

Q Do you recall him asking you any additional questions?

A No. That's what I recall.

Q So, what's the next thing that happened?

[44] A He asked – I remember him – I remember him asking other agents whether they had seen it. I believe they said no. Then he asked the agents to go into the crowd and see if anyone else – or go into the – you know, go into the – talk to the public and see if anyone else had witnessed me touch the Vice President, because at some point he said, Touching

is tantamount to assault. And I don't remember whether that was to me or to the other agents.

Q Where were you standing when you heard him say that?

A All I can – all I remember is my back was to him and I was looking for my son.

Q And up to that point, you had not told the Secret Service agents, either Reichle or anybody else, that you were – your son had disappeared and you were looking for your son, right?

A That's correct.

Q What's the next thing you recall happening?

A Agent Reichle – I remember – I believe, either before or after, some guy emerged – someone emerged from the crowd, said they had seen [45] me touch or assault the Vice President, at which point Agent Reichle grabbed me, handcuffed my hands behind my back, and told me I was being charged with assaulting the Vice President.

Q Now, when somebody emerged from the crowd and told that to Agent Reichle, did you see that person?

A Yes.

Q Okay. How was that person dressed?

A I believe that person – I – I believe that person was wearing a plaid or a flannel shirt, and I

remember they were fairly young, I'd guess in their 30s.

Q Male or female?

A Male. But, you know, a lot of stuff was happening, so I don't have perfect recall on that.

MR. WESTFALL: Could we – just for my benefit, please, I just want to make sure I'm clear on that. Could you read back that last couple of questions and answers if you would, please? So I can keep track of – maybe there was something that I wasn't –

THE REPORTER: Where do you want me to start? "How was that person dressed," do you [46] want to start there?

MR. WESTFALL: Okay. Before how the person was dressed. I want to get – make sure that we're clear about who we are talking about coming out of the crowd. It was kind of – it was kind of jumbled in my mind, and I just want to make sure I understand what your testimony is with respect to –

THE DEPONENT: Sure, that's fine.

MR. WESTFALL: – you know, just before the arresting decision.

MR. GALLAGHER: Do you want to read the transcript on the screen?

THE DEPONENT: Can I go to the bathroom quickly?

MR. GALLAGHER: Yes. Would you like to take a break here?

MR. LANE: Sure.

MR. GALLAGHER: This might be a good time for a break,

THE VIDEOGRAPHER: Going off the record, the time is 9:49. (Recess taken)

THE VIDEOGRAPHER: We are back on the record. The time is 10:01.

Q (BY MR. GALLAGHER) Mr. Howards, [47] before we took our break we were – I was asking you questions about what happened during the encounter with Agent Reichle. And you testified that an individual, a male, came out of the crowd and reported that he had seen you touch or assault the Vice President. Do you know whether that was a Secret Service agent or not?

A The person from the crowd, I – I don't know.

Q Okay.

A No, I – no. I – I don't believe that person was a Secret Service agent.

Q So you just – you just don't know who it was.

A No.

Q Okay. What's the next thing you recall happening at that point?

A At some point during this whole situation, I remember Reichle saying, Touching is tantamount to assault. I don't remember if it was when he was questioning me. I don't remember if it was when he was asking the agents if anybody had seen it. I don't – I don't recall where that happened, but I remember that occurred.

After this person came out of the [48] crowd, I remember Reichle or somebody saying, We have a witness, at which point Reichle took my hands behind my back and handcuffed me.

Q At the time that Agent Reichle handcuffed you, were there any other agents around you?

A Yes.

Q What happened to the bag that you were carrying?

A When he arrested me and started to take me away, I told him that I had lost my son and I couldn't abandon my son in the mall, at which point Agent Winters said to me, Don't worry, we'll call Social Services.

Q And Winters – who do you understand that Winters was?

A Winters works – works for the sheriff's office – was it Pitkin County?

Q Okay. Or Eagle County, I think.

A Eagle County, thank you.

Q So, what happened next after Winters made that statement to you?

A I – I said to Reichle and to Winters, My wife is in the area, at least let me tell my wife. And I don't remember whether they let [49] me or whether we simply crossed the path of my wife as we were leaving, but I saw my wife. I remember Reichle took the bag out of my hands and gave it to my wife.

Q Do you remember Agent Doyle being around you at that point?

A I remember his face, but I don't remember – I remember – I don't – I remember his face, but I don't remember his – his involvement.

Q Okay. Do you remember Agent Mischloney's involvement at all?

A No.

Q How was it that you knew Agent Reichle's name?

A Because when I was released, he gave my wife his business card.

Q So, at some point you end up running into your wife, correct?

A Correct.

Q And you don't recall whether the agents actually took you back to meet your wife or whether the

path that they were taking you on just intersected where your wife was, correct?

A Correct. At that point there was a fairly good commotion, so I don't know whether she

* * *

[90] A I – no, I can't.

Q And other than the allegations contained in the complaint, can you think of anything that Agent Mischloney did that you believe is unlawful or improper?

A I cannot recall.

Q Okay. So, with regard to the agents that have been named in this lawsuit, do you believe that they all were working together to arrest you in – well, strike that. Let me clarify the question.

Do you believe that all of the agents that are defendants in this lawsuit had the goal of retaliating against you because you had made a statement to Vice Cheney about American operations in Iraq?

A My understanding is that's one of the objectives of the lawsuit. I don't – I don't know – to determine that. I don't have an answer for you.

Q Okay. So, do you believe that Agent Reichle arrested you, at least in part, because of the allegations that you had made about Iraq?

A Yes.

Q Okay. What about Agent Doyle, do you think he was involved in that arrest, at least [91] in part, because of the allegations you made about Iraq?

A The only agent that I – I can recall having a dialogue with was Agent Reichle, so that's the agent that I feel clearest about in terms of the tone of the conversation, the substance of the conversation, and his – his possible intentions. The other agents, as I said before, you know, I can't – I can only – I can't – I can't do anything but speculate as to their, you know, intentions.

Q Okay. With regard to all of the agents that have been named in this lawsuit, do you believe that at the time that they took the actions that you've complained of in the lawsuit, that they were acting within the scope of their employment from the United States Secret Service?

A I – I don't know what the scope of their employment is.

Q Okay. Do you have any reason to believe that any of them were acting contrary to instructions that they had received or directives that they had received from the United States Secret Service?

A There's no way for me to know that.

[92] Q Okay.

MR. GALLAGHER: Can we take a minute? I'd like to go through my notes. I think I'm done.

MR. LANE: Absolutely. You know what, maybe we can take a late lunch, because I can't imagine you have very much.

MR. GALLAGHER: Yeah. Are you going to have questions?

MR. LANE: Just a couple of follow-ups.

MR. GALLAGHER: Okay. Why don't we take a quick break, I'll go through my notes.

THE VIDEOGRAPHER: Going off the record, the time is 11:01.

(Recess taken)

THE VIDEOGRAPHER: We are back on the record. The time is 11:14. This is tape 2 in the videotape deposition of Steven Howards.

MR. LANE: We have a point of clarification about the crowd and what – what happened when he approached the Vice President.

MR. GALLAGHER: Okay. That's fine.

Q (BY MR. GALLAGHER) I take it you want to supplement your previous answer?

[93] A Yes.

Q Okay.

A Because I remember, what actually happened was, I was accompanying Koby to his class – I want to be as accurate as I can be in my recollection – to his

class, and as we were going up an escalator or up the stairs – actually, I remember looking to my side and a man putting his hands together and bowing like this (indicating). And I looked up and Cheney was approaching us. And so I – what I then did was continued accompanying Koby to his class, at which point I told my wife Cheney was there and I wanted to go talk to him. And what – the reason I remember it is because I remember her saying to me, Be careful.

And what I did was, I then left to – left, went to the area where Cheney was. I approached him. And then after that conversation, I then went back up, picked up my son, and came back

Q Why would your wife say, Be careful?

MR. LANE: Objection to form.

Q (BY MR. GALLAGHER) You can answer it if you can.

MR. LANE: Go ahead and answer.

A Because of this administration's [94] history of dealing with people who disagree with their policies.

Q (BY MR. GALLAGHER) And what's your understanding of this administration's history of dealing with people who disagree with their policies?

A They're not pleasant.

Q Were you at all fearful that you would be retaliated against if you expressed those concerns to the Vice President?

A I was fearful there was that risk if I became – I was fearful there was that risk if I persisted.

Q So, you went in, you spoke with your wife, you dropped off your son –

A Right.

Q – and you came back outside.

A Right.

Q And then that's when you made the decision to approach the Vice President.

A That's correct.

Q So the questions I asked you before that talked about, you know – I think before you had said you waited a minute or a little more and then you approached the Vice President. When you [95] came back out of the – from dropping off your son, that's when you approached the Vice President.

A That's correct.

Q Okay. Is there anything about – anything else about what you previously testified to that you want to change or amend now?

A No. I mean, I think I went – as I said, I went back. At that point the Vice President had disappeared, but it was obvious from the people that were

hanging outside the grocery that that's where he was. I waited a short time. He re-emerged. He talked with at least one group of people. I waited my turn. I stepped forward, I said my piece, and then I walked on.

Q Now, earlier you testified that once you got to the police station, that an agent tried to interrogate you?

A Once I got to the police station, I was – I sat in a conference room, where as I – best I recall, Mr. Reichle and someone else was there, and I believe I signed something and they asked me questions.

Q But you didn't answer any of the questions?

A At some point I believe I was [96] advised not to, and I don't remember whether – but I – I don't – but that would have required somebody communicating with me, and I don't remember if I had the opportunity to pick up the phone or not. I mean, I don't – you know, that communication would have occurred between myself and my wife based upon something that was told to her, and I just don't remember having that conversation with her, but I do remember being very clear about not answering any questions.

Q Do you know who it was that was with Agent Reichle at that point?

A I don't recall.

Q Okay.

MR. GALLAGHER: I have no further questions.

THE DEPONENT Thanks. Sorry for that inaccuracy.

MR. GALLAGHER: That's fine.

MR. LANE: Do you mind if I jump in and ask a fill-in question that you may be interested in so we don't have to go back through it?

MR. WESTFALL: I'm perfectly comfortable with that.

[97] MR. LANE: Let me do that, then.

EXAMINATION

BY MR. LANE:

Q You testified earlier that you denied putting your hands on Mr. Cheney at some point when Agent Reichle made inquiry of you, and you indicated that that was inaccurate. Why did you deny to Agent Reichle that you had put your hands or the Vice President?

A Because it was so nonchalant and unconscious that it just didn't register at the time.

Q And can you demonstrate on me for the camera what it was that you did in putting your hands on the Vice President?

A It was – it was a situation where –

Q Let's make sure the camera can get us.

A – where it was like – we were talking like this, and then I went like this, and walked away, but it was – it wasn't – I didn't hold on to him. It was a touch, that I walked away like that.

Q So you didn't strike him, you [98] didn't –

A Twist him or anything like that, no.

Q You simply put your hand on his shoulder and walked past him.

A Correct.

MR. LANE: Okay. I have nothing further.

EXAMINATION

BY MR. WESTFALL:

Q Good morning, Mr. Howards. My name is Richard Westfall. I represent, again, Agent – Agents Misters Daniels and McLaughlin. And we met again this morning, and I want to thank you very much again for agreeing to come down and have your deposition taken.

I'd like to start off by going back to the time that you first encountered seeing Mr. Reichle. And I know that you've covered this ground with Mr. Gallagher, but – and I know that you've generally expressed in your previous testimony a lack of knowledge of him saying – you know, knowledge about details, but I want to do our best job today to refresh your

recollection so that we have, after your testimony this morning, everything that you can conceivably recall about the [99] number of people that were involved from the time that you first encountered Mr. Reichle, what they looked like, what they were wearing, and who did what. And I – so that's – so the next few minutes of our questions are all going to be focusing on exactly that. Do you understand, Mr. Howards?

A Yes.

Q Okay. Going back now, when do you first recall seeing Mr. Reichle?

A When he stepped out and flipped open his wallet with his badge.

Q Did you see him coming up to you?

A No.

Q So he just appeared in front of you?

A He just – he just appeared.

Q Approximately how long after you had – you had talked to the Vice President, touched him along the lines that Mr. – you had just described on – with your testimony with Mr. Lane, from that moment to the time that Mr. Reichle approached you, what is your absolute best recollection today as to how long that took place?

A It was probably about five minutes. It was the amount of time it took me to leave the Vice President, go up to my wife, have a brief [100] conversation

with her, get my youngest son, and come back. So however much – however much time that took.

Q And again, Mr. Reichle just appeared?

A Yes.

Q And the first thing he did was show you his badge?

A Correct.

Q And if I recall your testimony, you do or do not recall that he identified himself as Secret Service at that time?

A I don't recall, but I knew – I knew that he worked for some enforcement authority.

Q How was Mr. Reichle dressed that day?

A I believe he was wearing a tie and a jacket.

Q He approached you, he showed you his badge, and again, I – I just want – I want to go over this again just because I want to make sure I refresh your recollection as best we possibly can today.

A Sure.

Q Okay? Please go – again proceed [101] from that point. He presents to you his badge. Then what?

A What I remember, it was him saying – him saying that he wanted to talk – that – asking me if he could talk with me.

Q And what did you say?

A "No, you can't."

Q Then what happened? Actually, before you answer that, let me withdraw that question and ask you another one. At the point that Mr. Reichle approached you, presented his badge, asked you to – to talk with you, you said, No, you can't. –

A Right.

Q – were you aware of any other agent at that time?

A No, I wasn't.

Q So as of that moment, the only person that you're aware of is – is Agent Reichle?

A Is the person showing me his badge, correct.

Q You say – okay. Then you said, No, you can't. Then what happened?

A Then he persisted in asking me a series of questions. I use the term "badger." He [102] asked me first – I mean, he asked me whether – he – he may have asked me other questions leading up to this, but the question I remember was, Did you assault the Vice President? That's the question I remember.

Q Uh-huh.

A At which point I said, No. And then he asked me another question, which may have been, Did you touch the Vice President?

Q Were you moving at this time?

A Was I moving at the time? If I was, it was by no more than a few inches. It's hard – it's hard – it's hard to engage in – it's hard to be engaged in conversation and, you know, to be moving quickly.

Q Did Mr. Reichle – did Agent Reichle have to follow you at all to have – to continue this conversation?

A If he did, it wasn't by more than a foot because I was still looking for my son, so –

Q So you – okay. So, you say you were looking for your son.

A Correct.

Q You were trying to deflect Mr. – Agent Reichle's questions and trying to –you were [103] trying to pursue looking for your son; is that correct?

A I was trying to deal with two situations simultaneously. I was trying to respond to Mr. Reichle and I was trying to find my son.

Q Okay. Then what happened?

A Well, after – after I told Mr. Reichle that I had not assaulted the Vice President but I did tell him the way I felt about the war in Iraq, Mr. Reichle became visibly angry, and began – and then I faced my back to him because I was – as far as I was concerned, the conversation was over. I was panning for my son. And while I was panning for my son, I could simultaneously hear him behind me talking with the other agents and trying to find somebody who could

witness an assault or a touch that had occurred. And I did not leave the area, I mean, because I was still looking for my son.

Q At that moment, then, were you aware of any other agents besides Agent Reichle?

A I was aware of them by voice but not by face, by – by – they were behind me, not in front of me.

Q Okay. Then what?

[104] A I heard Agent Reichle ask the other agents if they had witnessed it, and then – witnessed an assault, and then I heard Agent Reichle instruct them to go into the crowd and ask anyone else if they had observed this assault or touching that had occurred. A short time thereafter – and again, so I was – I was – I was not very far away because I heard this – I heard this conversation occurring – someone came forward, an agent brought somebody forward – somebody forward who said he witnessed it, at which point Mr. Reichle grabbed me, handcuffed my hands behind my back, and told me I was being charged with assaulting the Vice President.

Q Was it just Agent Reichle at that point?

A There were other agents involved, but I don't remember who they were.

Q What do you mean, involved? Can you describe, were they – were they physically touching you?

A Yes, because I remember one agent had me by the right arm and one agent had me by the left arm, and there were other agents around because at this point Agent Reichle had asked for their [105] participation, both in confirming whether or not an assault had occurred and for finding somebody in the crowd who could confirm an assault had occurred. So I knew there were multiple agents involved.

Q And again, this was a conversation that was going on behind your back.

A Until I was handcuffed.

Q So that – was that the first time that you were aware that other agents were around Agent Reichle? Was it when the conversations were going on behind your back?

A Yes.

Q But you didn't physically see any other agents at that time?

A I just – I just don't recall. I mean, when – when somebody accuses you of assaulting the Vice President, you know, it's a big deal. And I'm not – I don't – at that point I wasn't focused on – on the crowd or other agents or anything else. I was – I was focused on, A, my son being lost, and B, what the agent was doing.

Q So, please recount again in the best detail you can the moment Agent Reichle comes up to you

and says that you're under arrest and tries to handcuff you.

* * *

[126] A Not physical.

Q But again, it's just – so you're saying with respect to the emotional distress –

A Correct.

Q – you think that's – that's an issue.

A Correct.

Q But you – you are not aware of any physical injuries to your wrist as a result of the handcuffing incident.

A No.

MR. WESTFALL: I have no further questions.

MR. GALLAGHER: David?

MR. LANE: I have a few.

EXAMINATION

BY MR. LANE:

Q You were asked earlier about whether you feel some responsibility for what happened there, and you indicated that while you did go up to the Vice President and criticize him, do you feel – just tell me

what you feel as a citizen, whether you have a right to do what you did.

A Absolutely.

Q All right. Did you feel that you [127] engaged in any misconduct of any sort that led to this incident?

A Absolutely not.

Q Do you feel as a citizen that you are obligated to speak to a law enforcement officer who wishes to speak to you?

A Absolutely not.

Q All right. Do you believe that under the First Amendment to the United States Constitution, you have a right to petition your government for redress in the form of approaching a high governmental official and voicing your opinion?

A Yes.

Q Did you do it in a respectful manner?

A Absolutely.

Q Was your voice raised when you were speaking to the Vice President?

A No, it was not.

Q Did you create any kind of a disturbance –

A No, I did not.

Q – when you did it? At any time did you see any agents, prior to your arrest, approach and talk to the Vice President after you had your [128] encounter with him?

A I did not, but recall that after I spoke with the Vice President, I intentionally left so as not to create an incident. I did not see the Vice President again for at least five minutes, so I have no idea what occurred from the time I left the Vice President until I returned.

Q Did you hear at any time the Vice President call out for help or assistance from any agents after you had your encounter with him where he was seemingly in distress or in need of an agent's protection from you?

A No, I did not.

Q Were you able to observe – well, withdrawn.

From the time you touched him on the shoulder until you were arrested, approximately how much time passed?

A Oh, approximately five-plus minutes.

Q Were you free to walk around and do whatever you needed to do in the period of time from the time you touched the Vice President until Agent Reichle arrested you?

A Yes.

Q Did any agents at my time [129] immediately make a move to seize you upon your having touched the Vice President?

A No, they did not.

Q Was there any discussion among the agents that you were aware of regarding whether or not they had any reason to be detaining you? Other than what you've read in discovery, I'm asking, do you have any recollection –

A No, I do not.

Q – of agents actually talking back and forth about, Why are we stopping this guy, should we stop this guy, should we question this guy?

A I'm not aware of any such discussions.

Q Okay. When you were handcuffed – prior to being handcuffed, were you asked to empty your pockets or did agents empty your pockets for you?

A They emptied my pockets.

Q Did agents put on any latex gloves prior to emptying your pockets that you recall?

A Not that I recall.

Q Did agents search through the plastic bag that you were carrying?

[130] A No, they did not.

Q How did your wife end up with the plastic bag?

A Agent Reichle – I believe it was Agent Reichle thrust it at her as we were leaving.

Q When you say "thrust it at her," does that mean roughly handed it to her, or threw it –

A Yes.

Q Okay.

A Roughly handed it to her.

Q All right. After you were handcuffed, did you see any agents talking to Vice President Cheney about whether or not – well, first of all, just – withdrawn.

Did you see any agents after you were handcuffed talking to the Vice President?

A No, because, again, I was leaving. I was leaving the scene, so I didn't.

Q Do you have any personal knowledge whether any agent ever spoke to the Vice President of the United States prior to your being arrested or subsequent to your being arrested about his being the victim of either the crime of assault or the crime of harassment?

[131] A I have no such knowledge.

Q Five minutes after you touched the Vice President and then you came back into the vicinity, was the Vice President still there?

A Yes.

Q Did he seem to be – well, what was his demeanor at that point? Did he seem afraid, did he seem alarmed, or was he still engaged in shaking hands, slapping backs, and signing autographs?

A He was still engaged in taking family photos, accepting hugs, putting his arms around people, putting – people putting their arms around him. There was no change in demeanor, other than the fact that the crowds had gotten slightly larger.

Q Had the Secret Service at that point whisked the Vice President away based on any perceived – anything, any threats, anything that you were able to see?

A No, they had not.

Q And this is five minutes after you touched the Vice President?

A At least five minutes.

Q Do you have any estimate as to approximately how many people you saw touch the Vice [132] President of the United States before, during, and after the time you touched the Vice President? Would you say dozens, would you say –

A I'd say 10 to 20.

Q 10 to 20 people?

A Right. Correct.

Q Do you have access to your cell phone records from the date of this incident that would show whether or not you were on the cell phone to somebody immediately prior to your encounter with the Vice President?

A I should be able to obtain those.

MR. LANE: All right. They have not been requested in discovery, but once we obtain those, we will provide those to you.

MR. GALLAGHER: Great.

MR. WESTFALL: Thank you.

MR. LANE: I can't think of anything else. I guess I'm done. Thank you.

MR. WESTFALL: And I hate to do this, but I'd like for us to take another brief break –

MR. LANE: No problem.

MR. WESTFALL: – to see if we have any questions in light of the questions that you [133] just posed, Mr. Lane.

MR. LANE: No problem.

THE VIDEOGRAPHER: Going off the record, the time is 12:13.

(Recess taken)

THE VIDEOGRAPHER: We are back on the record. The time is 12:20.

EXAMINATION

BY MR. WESTFALL:

Q Thank you, Mr. Howards. I just have one – a couple of brief follow-up questions regarding – that were triggered by your answers to Mr. Lane's questions, your attorney. You specifically mentioned that there were some other agents that assisted in the searching of your pockets?

A There was an agent who searched my pockets. I don't know who the agent was. I – I believe it was Mr. Reichle, but I'm not positive.

Q When did that take place?

A Actually, I'm not sure who – who took – it took place someplace en route to the SUV.

Q So, it was – it was after the arrest –

A Correct.

[134] Q – and before you were placed in the front seat of the sport utility vehicle.

A Correct. Correct.

Q Did – did they – was it at the place where you were arrested? Give us your best recollection –

A No, no. My best recollection was, it was someplace near the SUV. That's my best recollection.

Q So you stopped and –

A Correct.

Q – someone emptied your pockets?

A Correct.

Q You didn't do it yourself?

A No, I didn't.

Q Do you – and what's your absolute best recollection as to who it was that searched your pockets?

A I know Reichle was there. I don't know whether one person was holding me and a separate person was going through my pockets, but I believe it was one of the two people that were accompanying me to the SUV, but I don't recall which individual it was. I don't. I remember seeing my – I remember seeing – I remember that I wasn't [135] carrying my wallet, so I remember seeing my credit card come out of my pocket, but I don't recall who pulled the stuff out.

Q Do you believe the officers were in any way unreasonable in the manner in which they searched your pockets?

A I – I can't answer that because I don't know what's reasonable or unreasonable. I mean, they were –

Q Do you have any objection to the manner in which they searched your pockets?

A I have objection to the fact they searched my pockets.

Q The very fact that they searched is –

A That's – that's right. That – I have objection to that, but did they search my pockets in a – in an obtrusive way? No, they didn't. They simply reached into my pockets and removed what was in my pockets.

Q And again, your best recollection today is you can't recall specifically who it was that did that?

A That's correct.

Q What he looked like, what he – what [136] he was – thinking back –

A Again –

Q – an article of clothing, anything that –

A Again, this goes back to the question of who accompanied Mr. Reichle, and I don' recall who the second person was. I don't – so, I can't answer your question.

Q Okay.

MR. WESTFALL: That's all I have.

MR. GALLAGHER: I have nothing.

MR. LANE: I have nothing.

MR. WESTFALL: Thank you very much, Mr. Howards.

THE DEPONENT: Thank you.

MR. WESTFALL: We're off the record

THE VIDEOGRAPHER: This is the end of tape 2 of 2 in the videotape deposition of Steven Howards. Going off the record, the time is 12:24.

(The deposition concluded at 12:24 p.m., November 19, 2007.)

[137] AFFIDAVIT

STATE OF COLORADO)
) ss.
COUNTY OF)

I have read my deposition, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the amendment sheet(s) attached hereto as indicated.

Amendment sheet(s) attached [ ]

No changes; no amendment sheet attached [ ]

_____
STEVEN HOWARDS

SUBSCRIBED AND SWORN TO before me this ___ day of _____, 2007.

My commission expires: _____

_____
NOTARY PUBLIC

in and for the State of _____

PMH

EXHIBIT B – DANIELS STATEMENT

STATEMENT

STATE OF [Colorado])
)
COUNTY OF [Eagle])

I, [Special Agent Adam Daniels], being first duly sworn according to law voluntarily state:

On this ___ day of _____, 20___, I was interviewed by _____ who has been identified to me as a Special Agent of the United States Secret Service, Denver, Colorado.

This statement is a voluntary act on my part, made willingly and freely because I desire to tell the truth.

I am [29] years of age and I live at [Warren, Michigan].

[On 6/16/06, I was assigned as the counterpart to the Vice Presidential Protective Division, Counter Surveillance Unit, for the visit of Vice President Cheney to Beaver Creek, Colorado. At approximately 02:15 pm, I was standing in front of the N. Pearl Cashmere store, Village Plaza Beaver Creek, with my counterpart, SA Daniel McLaughlin, observing the movements of Vice President Cheney. At this time, we were approached by SA Dan Doyle, and were advised to monitor a white male subject, wearing a lime green t-shirt, who was standing across the street from our location. SA Doyle advised that he overheard the subject say on his cell phone something to the effect that he was going to ask Vice President Cheney how many kids he was going to kill. At this point, SA McLaughlin and I began to monitor the actions of the

subject. Approximately two minutes later, Vice President Cheney exited a store front across the street from our location, approximately 30 yards away. At this time, the subject (w/m green t-shirt) approached Vice President Cheney, and placed his left hand on Vice President Cheney's right shoulder. The subject made a statement to Vice President Cheney, which was inaudible to me at my location.

The subject walked away from Vice President Cheney towards our location in front of the N. Pearl Cashmere store and SA McLaughlin and I continued our monitoring of the subject. We were approached by SA Oscar Rosales, and SA McLaughlin asked if a protective intelligence team would be sent to our location to interview the subject. SA Rosales said yes, and proceeded to call the Security Room to request a PI team to interview the subject.

At this time, the subject began walking in the direction toward the ice arena in the center of Beaver Creek Village, the identical path taken by Vice President Cheney. SA McLaughlin and I followed the subject as he approached the ice arena, approximately 20-30 yards behind. At this time, SA Virgil Gus Reichle, who was assigned as the Intelligence Agent for this event, made contact with the subject near the ice arena, and attempted to conduct an interview. SA McLaughlin and I remained in our counter-surveillance role, but moved to within approximately 15 feet for agent-safety purposes. At this time, SA Reichle made a general question to SA Doyle, SA McLaughlin and I if the subject had touched Vice

President Cheney. At this time, I told SA Reichle "yes, I saw it."

SA Reichle told the subject that he was under arrest for assaulting the Vice President. At this time, the subject began walking away from SA Reichle. SA Reichle followed the subject, and attempted to take the subject into custody. The subject pulled-away from SA Reichle, and at this time SA McLaughlin, SA Doyle and I assisted SA Reichle in taking the subject into custody.

SA McLaughlin and I followed SA Reichle as he led the subject to his government owned vehicle, where he was transported to the Eagle County Sheriff 's Office.

I have read over the foregoing statement, consisting of [3] pages, and I have been given an opportunity to make corrections. All of the facts contained herein are true to the best of my knowledge.

/s/ Adam Daniels
(Signature of person making statement)

Sworn to before me this [16] day of [June], 20[06].

Special Agent, U.S. Secret Service

Authority to Administer Oath
Section 303, Title 5, U.S.C.

Witness by: _____

EXHIBIT C – MCLAUGHLIN STATEMENT

STATEMENT

STATE OF [Colorado])
)
COUNTY OF [Eagle])

I, [Special Agent Daniel McLaughlin], being first duly sworn according to law voluntarily state:

On this ___ day of _____, 20___, I was interviewed by _____ who has been identified to me as a Special Agent of the United States Secret Service, Denver, Colorado.

This statement is a voluntary act on my part, made willingly and freely because I desire to tell the truth.

I am ___ years of age and I live at _____.

[On 6/16/06 I was assigned to the counter surveillance unit, Vice Presidential Protective Division (B.C. Colorado). While working in a CSU capacity with SA Adam Daniels (Detroit field office) SA Daniels and I were standing in front of the N. Pearl Cashmere store at approximately 215 PM. At this time we were approached by SA Dan Doyle, he advised that we should pay particular attention to a white male subject wearing a green t-shirt who was standing across the street from our position. SA Doyle advised that he overheard the subject state while speaking on the phone something to the effect of "I want to ask Cheney how many kids he had killed." At this time SA Daniels and I began to monitor the activity of the above mentioned subject. Approximately 2 (two) minutes later Vice President Cheney exited a store

front (Generation BC) across the street from our location approximately 30 yards. At this time said subject (w/m green t-shirt) approached Vice President Cheney placed his left hand on Vice President Cheney's right shoulder and made a statement which was not loud enough to hear from our position across the street. At this time the subject walked away from the Vice President towards our location outside the N. Pearl Cashmere Store.

At this time, I observed ASAIC A. Wurst engage in conversation with SA Oscar Rosales. When this conversation ended I was approached by SA Oscar Rosales. I asked SA Rosales if a PI (Protective Intelligence) team would be needed to interview the above mentioned subject. SA Rosales indicated "yes" and called the Hyatt/Village Hall Security Room and requested that a PI team respond to our location to interview the subject.

At this time the subject began walking towards the ice rink in the center of Beaver Creek Village. The identical path as that taken by Vice President Cheney. SA A. Daniels and I began to follow the subject. While walking approximately 20-30 yards behind the subject I called the Hyatt/Village Hall Security Room and notified SA Rick Pearson that the subject was moving towards the ice rink and in the Village Center. During my conversation with SA Pearson I indicated that SA Gus Reichle who was assigned as the Protective Intelligence coordinator for this unit was on scene and he had made contact with the above

mentioned subject (w/m green t-shirt) and was attempting to interview him.

At this time SA Daniels and I remained in our counter surveillance role however moved into a position approximately 15 feet for agent safety purposes. At this time SA Reichle made a general question to SA Dan Doyle SA Adam Daniels and I if the subject had touched Vice President Cheney. At this point SA Daniels stated "yes I saw it." At this time SA G. Reichle told the subject he was under arrest for assaulting the Vice President. At this time the subject began walking away from SA Reichle. SA Reichle followed the subject and attempted to take the subject into custody. I observed the subject pull away from SA Reichle. At this time SA's Dan Doyle, Adam Daniels and I assisted SA Reichle in taking the subject into custody. SA's Daniels, Doyle and I followed SA Reichle as he lead the subject to his government owned vehicle. Where he (subject) was transported to the Eagle County Sheriff's Department.]

I have read over the foregoing statement, consisting of ___ pages, and I have been given an opportunity, to make corrections. All of the facts contained herein are true to the best of my knowledge.

/s/ _____

(Signature of person
making statement)

Sworn to before me this ___ day of _____, 20__.

_____ Authority to Administer Oath
Special Agent, U.S. Secret Service — Section 303, Title 5, U.S.C.

Witness by: _____

EXHIBIT D – REICHLE DEPO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEVEN HOWARDS, Plaintiff, v VIRGIL D. "GUS" REICHLE, JR., KRISTOPHER MISCHLONEY, DANIEL MCLAUGHLIN, DAN DOYLE, ADAM DANIELS, Individually and in Their Official Capacity. Defendants.	CASE NO: 06-CV-01964-WYD-CBS

* * * CONFIDENTIAL * * *

Washington, D.C.

Tuesday, November 27, 2007

Deposition of:

VIRGIL REICHLE, JR.

called for oral examination by counsel for Plaintiff, pursuant to Notice, at the Law Offices of Hogan & Hartson, 555 13th Street, Northwest, 12th Floor, Washington, D.C., before Mary E. Warner of Capital Reporting, sworn by a Notary Public in and for the District of Columbia, beginning at 1:01 p.m.

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[14] Vice President Cheney. That is all the information that I had to go on.

Q Okay. So you went the 75 to 100 yards to the designated location, is that correct?

A Yes.

Q And what – what happened there?

A Well, I encountered various personnel from the Vice President's detail who are very alarmed and concerned about something that had transpired.

Q Okay. Who in particular did you encounter?

A The first person I encountered was Special Agent Oscar Rosalis.

Q And what did Oscar Rosalis tell you?

A He said that there is – there's been an incident involving the Vice President. There's a protective intelligence subject that needs to be interviewed, and then pointed in the general location of the escalators as to where this person could be located.

Q When you say there's a "protective [15] intelligence problem," what does that mean?

A This could be a lot of things. In this case, in this situation, I didn't specifically know what. I just knew that presumably there's been a violation of law of some sort. There's been a violation because typically you do not call an intelligence agent unless there's

been a violation of law. It's like picking up the phone and dialing 9-1-1.

Q Okay. We've got to backtrack a little, because you're telling me that intelligence agents respond to violations of law, special agents are there to protect, but your job is essentially the same as their job is what I've heard you say, so correct –

A No.

Q Fill me in on this. Explain to me how your job differs from Daniels' and McLaughlin's job?

A You must understand everything in the Secret Service is extremely compartmentalized.

MR. GILLIGAN: Can – can I just – [16] before the witness answers, caution him against revealing any sensitive security techniques or protective methodology.

BY MR. LANE:

Q I'm not – I don't – I don't – I'm not asking you to tell me anything along those lines. I just want to know the nature of your job as opposed to the nature of their jobs. And their jobs are – you know, everybody in the public world generally understands their job. Your job I don't understand, so –

A Individual missions are really task-oriented. And as I said, it's very compartmentalized. As a protective intelligence working group, my main function is to go out and interview people that have committed a violation of law. It could be something so benign as

someone making a veiled threat such as, "I think somebody should kill the Vice President." That's just an example.

Q Okay. Did you hear from Rosalis what the violation of law was?

[17] A No.

Q Okay. I mean, isn't that important before you question someone that you have some idea, some intelligence of your own as to what it is you're – you're interviewing someone about?

A I believe it could have been helpful, but I felt that extenuating circumstances existed, and I didn't want to carry on a long discourse with Oscar Rosalis.

Q Well, I mean, when did you get some inkling of what had happened?

A It wasn't until after I had talked to Agent Doyle. He was actually the fourth person from the US Secret Service before I had any idea as to what was going on here.

Q Okay. Let's slow down then. Okay. Rosalis tells you there's a guy over there basically that you need to talk to. He points generically over in the escalator direction, is that right?

A Yes.

Q Okay. Did you know who he was referring [18] to?

A No.

Q Okay. Did you question him further about, "What are you talking about Rosalis?"

A No.

Q Okay. What happened then?

A I took another 10 to 15 steps and I run into Special Agent Ted Colshom who was the lead advance agent for the Vice President's detail.

Q Okay. And what did he say?

A Ted Colshorn obviously very alarmed and concerned about something that had transpired indicated that there's a protective intelligence subject that needed to be interviewed, point – once again pointed off in the general direction of the escalators but also indicated that the subject is a white male wearing blue jeans, has a T-shirt and a ball cap.

Q Okay. Did he describe what color the T-shirt was?

A I believe he said green.

Q Okay. So what did you do then? Did you [19] ask him, "What's up?"

A No, I didn't.

Q Okay. What happened then?

A I took another 15 to 20 steps and I run into ASAIC Andy Wurst.

Q What happened then?

A Once again, the supervisor, obviously very alarm and concerned about something that had transpired, asked me where my counterpart was.

Q Meaning Mr. Winters from the Eagle County Sheriff's Department?

A Yes.

Q What did you say?

A I said, "Deputy Winters is with the other police officers from the Colorado State Patrol and waiting in line for his photo opportunity with Vice President Cheney."

Q Okay. What happened then?

A Walked towards the escalators, and I –

Q Hang on. Let me – let me just stop you. Okay. Colshorn – excuse me, Wurst asks you, "Where's your counterpart?" You tell him, but did [20] you ask Wurst, like, "What's up, man?"

A No.

Q Why not?

A Once again, I felt that extenuating circumstances existed and I wanted to try to at least make eye contact with where this protective intelligence subject was.

Q Okay. So then what happens?

A I walked towards the escalators, and I make eye contact with Special Agent Doyle.

Q Okay.

A And Doyle basically pointed in the general direction of Mr. Howards, identified the protective intelligence subject that was, in fact, wearing a ball cap, blue jeans, T-shirt, carrying a bag.

Q Okay. What happened then?

A Agent Doyle gave me a quick thumbnail sketch that he had overheard the subject on a cellular telephone whom stated, "I'm going to ask him how many kids he's killed today." It was just assumed that he was talking about Cheney.

[21] I didn't ask anything further. At that point I pull out my credentials and approach Mr. Howards, identify myself as a US Secret Service agent just asking if I could speak to him for a few minutes.

Q Okay. And what did he say?

A Mr. Howards, extremely belligerent, acting quite bizarre, might I add, shook his finger in my face, told me that I'm violating his rights and walked off.

Q Okay.

A So once again, I asserted myself, "Sir, I really just need to talk to you, this is no big deal. I just want to talk to you."

Q Okay. So what happened?

A Has a few expletives for me.

Q What did he say?

A "Fuck you, I don't have to talk to you and I'm not going to talk to you," and walks away.

So at that point I'm looking over my left shoulder, I'm looking over my right shoulder. Dan Doyle is there along with the two counter [22] surveillance unit agents, Daniels and McLaughlin.

I said, "Guys, what's this all about, what's going on here."

Q What happened?

A Well, the agents conveyed to me the fact that Mr. Howards had approached Cheney in an aggressive and threatening nature and made unsolicited physical contact with Vice President Cheney but yet continued to remain in the area.

Q Okay. Let's backtrack and tell me as well as you can, the exact words spoken by Doyle, and who was the other one that was there?

A Daniels, McLaughlin and Doyle.

Q Okay. Daniels, McLaughlin and Doyle were all there, you were asking all of them, "What's up, guys?" Who said what? And try your best to remember the exact words each of them spoke.

A May I refer to my notes?

Q Absolutely. Tell me if they're in that binder and then also refer me to the page you're looking at.

MR. GALLAGHER: Let me start on page 32. [23] It's going to be Exhibit 10.

THE WITNESS: Okay. Thank you.

BY MR. LANE:

Q Have you refreshed your recollection?

A Yes, I have.

Q And what page are you looking at to refresh your recollection?

A I'm looking at Exhibit 10.

Q All right. In the bottom lower right-hand corner, it says, "Howards 32"?

A Page 32.

Q Okay. And where on page 32 were you reading?

A Approximately –

Q Halfway down?

A Not quite halfway down. I'm going to say maybe 25, 30 percent down.

Q Okay. So what did Doyle, McLaughlin and Daniels tell you? And describe each of their comments to the best of your recollection as you recall them today.

A Well, totality of the circumstances, it [24] was conveyed to me that Mr. Howards as – as described by Agent Doyle was overheard on a cell phone stating, "I'm going to ask him how many kids he's killed today."

Q And Doyle told you this?

A Doyle told me this.

Q Okay. Now, when Doyle told you that, what did you take that to mean?

A Well –

Q "How many kids did you kill today?"

A I wouldn't take it as a friendly statement.

Q Okay. What did you assume he was referring to?

A Well, I'm assuming that he's referring to the war in Iraq.

Q Okay. Not a friendly statement, referring to the war in Iraq. Okay?

A All right.

Q What – Doyle heard – Doyle tells you he overheard Howards on his cell phone saying those things?

[25] A Yes.

Q Okay.

A So that indicated to me that when he made his approach to Cheney, he made his approach with malice.

Q Okay.

A And told me what his frame of mind was.

Q Okay. All right. So then who told you he approached Cheney?

A All three of them told me that he approached Cheney.

Q Okay. And what did they tell you he did when he approached Cheney?

A Well, they said that he approached Cheney from Cheney's 5:00 position.

Q Meaning Cheney's looking straight ahead, is that midnight?

A Yeah. Cheney looking straight ahead is midnight.

Q Okay. So 5:00 would be to Cheney's left and behind?

A Well to his right and behind.

* * *

[30] Q Well, it's from a completely different angle, isn't it, McLaughlin and Daniel were face to face with Cheney, right?

A Correct.

Q You're coming up from behind, is that correct?

A That's correct.

Q And Doyle told you he saw Howards approach Cheney from behind and do what you just did. is that right?

A That's correct.

Q And that's what Doyle told you happened, is that correct?

A That's correct.

Q And were Daniels and McLaughlin present when Doyle did this demonstration for you?

A Yes.

Q So they saw Doyle come up from behind and give a sharp slap just like you just did, is that right?

A Yes.

Q Now, if you had been an agent right there [31] on the scene and somebody came up to the Vice President and smacked him that way, would you have grabbed that person right then and there?

MR. GALLAGHER: Object to the form. He can answer, if he can.

THE WITNESS: Yes, I would.

BY MR. LANE:

Q Okay. Because you would have probable cause that that person has struck the Vice President, wouldn't you?

MR. WESTFALL: Objection. form.

THE WITNESS: Yes.

BY MR. LANE:

Q Okay. Now, you heard Daniels and McLaughlin testify that – that – and then you've read their reports, is that correct?

A Yes.

Q Okay. Were there reports that they saw him place his hand on Cheney's shoulder, right?

A Yes.

Q And you have heard them say that they didn't believe that they had probable cause that [32] he had done anything wrong or violated any law warranting being arrested. You heard that testimony, didn't you?

A Yes.

MR. GALLAGHER: I'm going to object to the extent that mischaracterizes the testimony.

BY MR. LANE:

Q Okay. Did I mischaracterize the testimony?

A Well, slightly, but in essence.

Q In what way?

A Well, they were also talking about, a little about the totality of the circumstances. They said that they did not quite rise to the level of what they believe is probable cause, but certainly in my case, based upon the information that I had obtained, I certainly felt that I had probable cause.

MR. GALLAGHER: The other – I will clarify since you asked the question. My – my objection was based upon the fact that both of those agents were – both of those agents were [33] very careful to testify that they were talking about the incident relating to just the slap, or the – or the touching, as opposed to the totality of everything that had happened before that and after that. That's the basis of my objection.

MR. LANE: Okay.

BY MR. LANE:

Q So – so what Doyle – let me ask you this. Okay. Doyle said that this is what happened. And you demonstrated almost a shove, a slapping kind of a shove in the back to the Vice President, correct?

A Yes.

Q And you've testified that if you were there and that happened, you would have grabbed him right then and there, right?

A Yes.

Q Okay. Did you make inquiry as to Daniels or McLaughlin or any other agents, "Why did you guys let this guy go if he did that?"

A What I did do is I looked at both Daniels [34] and McLaughlin and they basically said, "Yes, I saw it," after it was demonstrated on me.

Q So they say that – to you that they what Doyle did is accurate, his demo to you is accurate?

A Certainly that's my perception.

Q Okay. They didn't testify to that today, though, did they?

A I don't believe so.

Q Okay. Do you have any explanation for why they didn't testify to that today?

A No.

Q Okay. So what happened then?

A At that point I was – engaged Agent Doyle in a conversation. I said, based upon the totality of the circumstances, his premeditation, the conversation on the cell phone, the fact that Mr. Howards would not talk to me, the fact he's walking around with a bag in his hand in an unmagged area, and the fact that you're telling me that he had unsolicited contact, I had probable cause, so I decided to make an arrest and I went [35] after Mr. Howards.

Q What's an unmagged area?

A We did not have magnetometer support in that particular area – area because it was an off-the-record movement.

Q Okay. You believed you had probable cause to arrest Steve Howards for assaulting the Vice President, is that correct?

A Yes.

Q Okay. And you also understand that you need probable cause before you can make an arrest, is that correct?

A Yes.

Q And you also understand that people have a right to approach the Vice President of the United States and say to him, "Your policies in Iraq are disgusting." You understand they have that right under the First Amendment, is that correct?

A Yes.

Q And you understand that if you arrested him in retaliation for having said that to the [36] Vice President, and that's the real reason you arrested him, you would be in violation of his First and Fourth Amendment rights?

MR. GALLAGHER: I'm going to object to the form of the question.

BY MR. LANE:

Q You can answer it.

A Yes. I believe that certainly would be wrong.

Q Now, did you ask – right now – I mean, you've given us the names of like five or six agents present that apparently saw what transpired there, correct? You've got Rosalis, Wurst, you've got Colshorn, you've got McLaughlin, you've got Daniels, you've got Doyle, right? There are a lot of people there that saw what happened, right? A lot of agents?

MR. WESTFALL: I – I object to the form and I don't want to be cute about it. It's just I'm not sure that there's testimony that every one of those people saw it –

BY MR. LANE:

[37] Q Let me ask you – did they tell you they all had seen what happened?

MR. WESTFALL: – I don't think there's testimony on that.

THE WITNESS: No.

BY MR. LANE:

Q Okay. Did you believe it was going to be important to find out from agents who were actually within spitting distance of what happened to find out what happened?

A Yes.

Q Okay. Did you subsequently interview agents who were within, say, eight feet of what happened?

A I did my best to reach out to everyone that may have been an eyewitness.

Q Okay. Did you get corroboration from anyone that it went down the way Doyle told you it went down?

A Yes.

Q Who corroborated that?

A The White House photographer.

[38] Q Who is that?

A I believe his name is David Bore.

Q What did he say?

A Basically he – that stated that an individual came into his field of view, made a beeline, quick approach to Vice President Cheney, reached over a small child and gave a forceful pat to Vice President Cheney's right shoulder, said something to the effect of Iraq – had something to do with Iraq, and moved on.

Q Okay. Do you believe that any agent exercising common sense and using their training and experience with the Secret Service, had they seen what you just demonstrated, should have arrested him right there on the spot?

A Yes.

Q Have you sought any corrective actions against these agents who were eyewitnesses to what happened who did not make an arrest right there on the spot?

A I brought my concerns to the attention of my immediate supervisor.

[39] Q Who is your immediate supervisor?

A Kevin Worthington.

Q And where is he located?

A He is a criminal supervisor in the Denver field office, criminal investigatory supervisor.

Q And how did you make these concerns aware to him?

A I expressed to ASAIC Worthington that I felt that Inspection Division should get involved here and that everyone involved should be offered a polygraph, to include myself.

Q And what was the upshot?

A Don't go there, Gus.

Q Don't go there, Gus?

A Don't go there Gus.

Q What does that mean?

A It means let it lie, drop it.

Q So you wanted everybody to take a polygraph to find out what the truth was about what happened there?

A Yes.

Q Now, that's a very unusual request from [40] one – one employee of the Secret Service to a supervisory person within the Secret Service that your fellow agents get polygraphed, isn't it?

A I don't think it was unusual. I thought this was an unusual incident based upon one's interpretation I suppose.

Q Well, polygraphs are designed to detect who is telling the truth and who is not telling the truth, do you agree with that?

A Yes.

Q And polygraphs are important when there are disputed issues involving any given incident, is that correct.

A Yes.

Q And here, apparently you believe that your fellow Secret Service agents were giving you disputed versions of what had occurred, is that correct?

A Yes.

Q All right. What was – I want you to outline for me in a narrative fashion what the dispute was about, who was taking what position [41] vis-a-vis the

dispute that you're referring to. So let's start out with what was the disputed issue of fact that you were concerned about?

A I wanted to try to get as many witness statements from people that were on the detail as possible. And I felt that my investigation was obstructed.

Q By whom?

A By elements. supervisory elements of the Vice President's detail.

Q Can you give me some names. And this is all subject to a protective order, so nobody is going to be leaking this stuff out of this room.

A At one point I asked Agent McLaughlin if he would basically talk to me and my SAIC, Special Agent in Charge Lon Garner in regards to what had transpired.

Now, this was approximately 48 hours after the fact. And Agent McLaughlin stated to me that, you know, he's essentially been advised not to discuss this case with me or other Denver personnel.

[42] Q And did he tell you who had advised him not to discuss this case?

A His supervisor, whoever that might be.

Q You don't know who his supervisor is?

A No.

Q Okay. So McLaughlin would not discuss this case with you, even though you relied on McLaughlin's information in part to make an arrest, is that right?

A That's correct.

Q Okay. Now, I – I, again, am not privy to the inner workings of the Secret Service, but it seems to me that you should all be on the same team, does it seem to you?

A One would hope – one would hope so. So.

Q Here apparently there's some division between the protective detail assigned to the Vice President and the Denver field office, is that what I'm hearing?

A I certainly got that impression.

Q Okay. So you wanted to talk to McLaughlin. McLaughlin told you, "No. I've been [43] advised not to cooperate or talk with you." Is that right?

A Yes.

MR. WESTFALL: Objection to form on that one. I'm a little slow on that one.

BY MR. LANE:

Q What then happened?

A At that point I asked my SAIC, Special Agent in Charge Lon Garner, please assist me to locate as many independent third-party witnesses that may have saw what's happened.

Q Okay. And what happened then?

A We did get the statement from the White House photographer. We also got an additional statement from one of Vice President Cheney's staffers.

Q Okay.

A And – and I can't recall who else. Oh, oh, I – I – let me stand corrected on that. I also got a statement from Agent Mischloney. I think – to the best of my recollection, I think that's all the statements.

[44] Q What led you to believe that there were factual disputes. And – in other words, what – why were you scratching your head that – that motivated this, what was the problem you were having here?

A Well, it was approximately three hours after the fact. I'm at the Eagle County Sheriff's Office. Agent Doyle showed up, provided me a written statement as to what had transpired. Upon leaving the parking garage with Mr. Howards in tow, I basically presented Agent Daniels and McLaughlin a statement advising them to fill these statements out. I also gave instructions to Agent Mischloney to basically collect these statements and then bring these statements to me ASAP.

Q Okay.

A Like I said, it was about three to four hours after the fact. I'm still at the Eagle County Sheriff's Office. I'm – I get in touch with Agent Mike

Mischloney and ask him about the statements, "Do you have them?"

[45] He said, "No, I don't have them."

So at that point I call up Agent McLaughlin on the telephone. I ask him, you know, where the statements are and please provide those as instructed to Agent Mischloney. Agent – Agent McLaughlin says there was no assault, it didn't happen.

Q McLaughlin said to you there was no assault. it didn't happen?

A That's correct.

Q Okay. Now, McLaughlin didn't say that today in his deposition as you sat here, did he?

A I don't recall him saying that.

Q Okay. Any explanation for why?

A I can't speculate on that.

Q Okay. So he told you there was no assault. What happens then?

A At that point I drive back and actually go to another movement that Vice President Cheney had. It was in proximity to, you know, the Eagle County jail and the town of Avon. It's was a golf course – I believe it was called Red Rock Golf [46] Course or something to that effect, but I was there to support the Vice President once again in a protective intelligence capacity.

Q Okay. But let – let's go back now to in the meantime Steve Howards – you know, Doyle tells you and describes for you an assault that you demonstrated, right?

A Yes.

Q Based on Doyle's demo, you thought that that was an assault?

A Certainly.

Q I mean, because that was beyond merely, like, touching someone on the shoulder, right?

A Yes.

Q Had he – had you been informed that he simply touched him on the shoulder, you wouldn't believe that to be an assault, would you?

A Well, that, coupled with the fact that he approached Cheney with malice, even so much as a light touch, based upon the earlier conversation I'd say that would be an assault, too.

Q Okay. We can talk about that in a [47] minute. But –

A I mean, they weren't old high school football buddies, I think we can agree on that.

Q Right. But you also understand that incidental contact, no harm, no foul, okay? In life, that's generally true. When you – when you –

A It wasn't conveyed to me that this was incidental at all, it was willful and wanton.

Q And it was a – it was a blow more than a touch?

A Yes.

Q Okay. McLaughlin tells you there was no assault. Well, describe for me the conversation you had with him because you must have then said, "Look, you know, you saw what Doyle did and you said that's what happened and now you're telling me that's not what happened." Did you have a conversation to that effect?

A Yes.

Q Well, explain how that all went down.

A I asked him if someone was pressuring him [48] to change his testimony.

Q What did he say?

A He says "No."

I said, "Well, this isn't the rendition that I had heard three to four hours ago."

Q And what did he say?

A He hung up.

Q He just hung up on you?

A Hung up.

Q Okay. What did you do?

A Let me stand corrected. I did say one more thing. I told him that I want the original statement. And then he hung up the phone.

Q What's the source of all of this? Why – why all this conflict here?

A That would require speculation, and I'm not going to speculate.

Q Well, you know, in a deposition you're allowed to. And you – you would be able – for me, it would be complete speculation. You're an insider, give me your best guess –

MR. GALLAGHER: I'm going to object –

[49] BY MR. LANE:

Q – as to what's going on here.

MR. GALLAGHER: I'm going to object to the question on the grounds that he doesn't have the foundation to testify about this.

BY MR. LANE:

Q But you do have foundation because you're there and you've been an agent for how many years?

A Eight and a half.

Q Okay. So you know the inner workings, you know the politics, you know what's going on. What's it all about?

MR. GALLAGHER: Same objection.

BY MR. LANE:

Q He's objecting, but you can answer.

A Once again, this is mere speculation on my part.

Q Absolutely.

A First and foremost, they probably just don't want to inconvenience the Vice President. Certainly they don't want him to be bothered with a deposition.

* * *

[54] reason to lie to me.

Q Okay. When Steve Howards got arrested, you hadn't spoken to him yet, right?

A Say this again.

Q You hadn't spoken to the photographer prior to arresting Steve Howards?

A No, I hadn't.

Q Your arrest was made on Doyle's statement about what happened, right?

A Yes.

Q And it was corroborated through the silence of McLaughlin and Daniels?

A I wouldn't say silence.

Q They – they affirmatively said, yeah, that's what happened?

A "Yes, I saw it." Well, I believe was the coop – the quote.

Q Doyle demoed it, these guys both said that they saw it?

A Yes.

Q Okay. They never took issue with Doyle's rendition of what happened?

[55] A No. At no point – you – you would think if it was some sort of misunderstanding, somebody would have tapped me on the shoulder and said, "Whoa, whoa, whoa, Gus, slow down. What you think happened isn't what happened." At no point did that happen.

Q Okay. Okay. So let's get back to the polygraph issue. So – so the – the question in your mind is was there an assault, wasn't there an assault? McLaughlin is hanging up the phone on you. Did you try to talk to anybody else?

A Yes, I did.

Q Who else did you try to talk to?

A One of my classmates from the academy – his name was Kevin Howell – he was actually working the shift that day. At some point – I'd say within 24 hours of this event happening, I said, "Kevin, what did you see? Did you see anything?" All Kevin was

could tell me was that he didn't see anything but he heard something.

Q What did he hear?

A He heard a slap, a – a thud, a slap, a [56] sound.

Q Did you or anybody ever ask the Vice President, "Did some guy come up and hit you?"

A I was never allowed access to the Vice President.

Q Really?

A Never.

Q Would you agree with me that the Vice President may be able to resolve this factual dispute?

A Potentially.

Q I mean, as the victim of the slap or the touch or the shove or whatever it was, presumably he would be the one guy that would be able to shed some light on this whole factual issue?

A Possibly.

MR. GILLIGAN: Objection to the form.

THE WITNESS: Assuming he remembers it. I don't know. I can't speak for the Vice President.

BY MR. LANE:

[57] Q Sure. I understand that. But as a criminal investigator, a criminal investigator, Winters charged Howards with harassing the Vice President, right?

A Yes.

Q The Vice President is allegedly the victim of this harassment, right?

A Yes.

Q Have you ever in your entire career in law enforcement, which at least covers, what, eight years in the Secret Service and 12 years as a CSP?

A Five years as a state trooper.

Q Okay. Five years as a state trooper. Can you – other than a murder case, can you envision doing an investigation of a crime without talking to the victim? I mean, that's basic investigation 101?

A Well, yeah, I investigate a lot of vehicular assault cases where the victim unfortunately was in a coma.

Q All right. That's the equivalent of a [58] murder, okay? If you – I mean, it's basic – you learn this as the first week of school, talk to the victim, see what they say, right?

A Certainly.

Q Okay. Cheney is the victim, right?

A Yes.

Q Okay. Has anybody talked to the victim of this crime that you know of?

A Allegedly Special Agent in Charge Mike Lee talked to the Vice President. And the Vice President Cheney indicated that he didn't feel that he was assaulted. Now, that's hearsay, but that was – that was indicated to me through my – my supervisor Lon Garner.

Q Do you recall when Lee talked to – he said he talked to the Vice President?

A According to Special Agent in Charge Lon Garner, yes, that – and allegedly this conversation happened within – within an hour or two of the – of the incident.

MR. LANE: Can we take a little break here and let me talk to counsel. Do you want to [59] do that?

MR. GILLIGAN: Certainly.

THE VIDEOGRAPHER: The time is 1:47 p.m. We're going off the record.

(Short break taken)

THE VIDEOGRAPHER: The time is 2:03 p.m. We're back on the record.

BY MR. LANE:

Q Okay. Is it fair to say that you don't believe that McLaughlin or Daniels are telling the truth about what happened?

A I can't answer for them.

Q Well, they're giving you a rendition of the facts based in this deposition that differ substantially from what Agent Doyle told you, is that correct?

MR. WESTFALL: Objection to the form.

THE WITNESS: I would not say substantively.

MR. GALLAGHER: I'm going to enter the same – the same objection.

BY MR. LANE:

[60] Q Well, I think we've already covered that ground. You saw the demos here with McLaughlin and Daniels, right?

A Yes.

Q Okay. And you've already said that they differ from the demo that you did with your counsel, right?

A Agent Daniels and McLaughlin believe what they believe. There's nothing I can do about that. That's their version of the events.

Q Well, we go back to polygraphs. Polygraphs are designed to ferret out truth from lies, aren't they?

A Yes.

Q So do you believe someone is being truthful and someone is being untruthful?

A Could you repeat the question.

Q Yeah. If you truly believe in the Easter Bunny, you'll pass a polygraph when they ask you is the Easter Bunny is real, and you say, yes, the Easter Bunny is real. If you honestly believe you're telling the truth, you're going to beat a [61] polygraph, aren't you?

A Yes.

Q Even though what you're saying is completely false, correct?

A Yes.

Q All right. So my question to you is you believe someone is telling the truth and someone may be not telling the truth in conjunction with this case, correct?

A It's possible.

Q All right. And you've just said Daniels and McLaughlin believe what they believe. You said that also, right?

A Yes.

Q Okay. But a polygraph is designed to see if Daniels and McLaughlin are lying, isn't it? If you put

them on a polygraph, it's designed to see are they telling truth or are they lying, right?

A Yes.

Q Okay. And by suggesting a polygraph to your superior, the implication is you believe someone here is telling the truth and someone here [62] is lying, correct?

A I wanted to rule that out as a possibility.

Q All right. Because if everybody passes a polygraph, even though they have divergent views on what happened, then that simply means someone may be honestly mistaken, correct?

A It could add – yes. They could add a different angle, different view.

Q Okay. But did you tell your superiors that you believe someone was lying?

A Not in those words.

Q Someone was being untruthful?

A What I told my immediate supervisor, Lon Garner, is that, why don't we entertain the possibility of putting – at least contact the intelligence division and have an internal investigation. I'm more than willing to take a polygraph and see where this goes.

Q And what was the upshot of that?

A Well, the fact that we would know who's being truthful and who's not being truthful.

[63] Q Right. But what did Garner do about the suggestion of a polygraph.

A Don't go there Gus, let it go.

Q Why do you believe – and I know it's speculation, only Mr. Garner can speak to this, but based on your training and experience with the Bureau – or with the Agency, why did he say that?

MR. GALLAGHER: Objection, form.

THE WITNESS: I don't know.

BY MR. LANE:

Q What do you think?

MR. GALLAGHER: Objection, form.

THE WITNESS: Once again, I can't speak for Mr. Garner.

BY MR. LANE:

Q I know, but you have better insight than I do. So I'm trying to get the benefit of your knowledge and experience in – in forming my speculation?

MR. GALLAGHER: I'm going to object to the question. He has answered the question twice now.

[64] MR. LANE: I know he doesn't know, but he does have some reasonable opinion that may explain it.

THE WITNESS: I'm saying –

MR. WESTFALL: Objection to form, based upon your characterization –

MR. GALLAGHER: He's answered the question twice now. Why don't you move on?

MR. LANE: Because I don't want to move on. I want to get an answer to this question.

BY MR. LANE:

Q Based on your experience, why do you believe that he said, "Don't go there"? I know you don't know.

MR. GALLAGHER: Same objection.

THE WITNESS: It would require speculation, and I don't want to speculate any more than I've already speculated here thus far.

BY MR. LANE:

Q Well, that's what I'm – exactly what I'm asking you to do, and there's no privilege that your lawyer can tell you not to answer the [65] question. And I will call the magistrate on this one because this will lead to discoverable evidence possibly. Given your experience with the agency, what is your best guess as to why he would say, "Don't go there"?

A Perhaps –

MR. GALLAGHER: Same objection.

THE WITNESS: Perhaps Lon Garner didn't want to stir up a hornets' nest. I – once again, I can't speak for him.

BY MR. LANE:

Q And putting agents on the box would stir up that kind of a hornets' nest?

MR. GALLAGHER: Objection.

THE WITNESS: Yes.

BY MR. LANE:

Q Okay. Did you come to find out from Agent Lee that the Vice President's version of events more closely matched Daniels' and McLaughlin's version of events than Doyle's version of events?

A I never spoke to SAIC Lee.

[66] Q Okay. Did – well, you said that Lee talked to Cheney and said he wasn't assaulted?

A And this was hearsay from Lon Garner. Lon Garner is conveying this to me.

Q Okay. All right. Did Lon Garner tell you that Cheney's version of events jives more closely with Daniels' and McLaughlin's than it does with Doyle's?

A No.

Q Okay. If – let – let me ask you this, now, okay? Part of your training is you understand that only – you can only arrest somebody with probable cause to believe they committed a crime, correct?

A Yes.

Q And if you have knowledge that a fellow officer is operating under a mistaken set of beliefs, that probable cause does exist – well, let me lay it out this way.

You're – you're an officer. You believe, given all the totality of circumstances, probable cause exists, all right? And you have [67] two fellow officers standing there who know that you're operating under a mistaken set of beliefs and that, no, this man is innocent, there is no probable cause, okay? Assume that.

Are the officers who are aware that there is no probable cause, are they duty bound or ethically obligated or by agency rule required to say something like, "Hey, Gus, no. This is not what's going on here. He didn't do what Doyle said he did," for example?

MR. WESTFALL: Object to the form.

MR. GALLAGHER: Objection to the form of the question.

Q You can answer it if you can.

THE WITNESS: Yes. Why would they want me to operate under false assumptions?

BY MR. LANE:

Q Okay. Who was present when you told Steve Howards, you are under arrest for assaulting the Vice President of the United States?

A I know for a fact that Agent Doyle was there. I – I believe McLaughlin and Daniels and [68] Mischloney were there as well.

Q Did McLaughlin, Daniels or Mischloney ever say to you, "Wait a minute, he didn't assault the Vice President of the United States"?

A No.

Q Had they said that, what course of action would you have taken?

MR. GALLAGHER: Objection, calls for speculation. You can answer it if you can.

THE WITNESS: If I was operating under a false set of assumptions and I'm getting indications that there's some sort of a – of a conflict of facts here, I'd have to put the brakes on it because then I wouldn't have probable cause. I've got to sort through those facts before I can rationally make a decision as to whether I have probable cause.

BY MR. LANE:

Q Okay. Did – and McLaughlin I think you said flat out told you later there was no assault.

A Approximately three to four hours later, yes.

[69] Q Okay. So is it your presumption that McLaughlin at the time you were saying, "You're under arrest for assaulting the Vice President of the United States knew full well that Steve Howards had not assaulted the Vice President of the United States?

A I can't –

MR. GALLAGHER: Object, calls for speculation.

THE WITNESS: I can't speak for Agent McLaughlin.

BY MR. LANE:

Q Understood. But did you – when he said that, did ask him, "Well, McLaughlin, how come – where were you when I was putting the handcuffs on Steve Howards if there was no assault?"

MR. GALLAGHER: Can I just clarify. When – when he said what?

BY MR. LANE:

Q When McLaughlin said to you there was no assault did you ask him, "Hey, McLaughlin, why didn't you pipe up when I was putting the cuffs on [70] this guy arresting him for assaulting the Vice President?"

A Certainly that was inferred.

Q What did he say?

A "There was no assault."

Q Right. But then when – I mean, did you ask him at that point, "Well, you know, you were standing there when I was arresting him for assaulting the Vice President, and if you knew there was no assault, why didn't you say something?" Did you ask McLaughlin that?

A No. In essence, you know, I did ask, "What's changed in the last four hours?"

Q And what did he say?

A "Has someone, you know, coerced you, changed your testimony? Is something going on here that I need to know about?"

Q What did he say?

A "No. There was no assault." Click.

Q And Lon Garner told you that Vice President Cheney's version of events was also that there was no assault?

[71] A No. No. What was told to me by agent Garner, Special Agent in Charge Lon Garner is that he has spoken to Mike Lee, and then allegedly Mike Lee spoke to Vice President Cheney. Vice President Cheney conveyed that he did not feel that he was assaulted.

Q Now, you understand – first of all, is there a federal definition of assault that you know of?

A Black's Law Dictionary.

Q Okay. But you understand that some statutes defines various crimes as being A, B, C, D, E, various elements of – of an offense, right?

A Sure.

Q You understand that the State of Colorado defines assault, correct?

A Correct.

Q And you know that from your days as a state trooper, correct?

A Correct.

Q And there's certain elements that have to [72] be met before an assault can be charged, is that correct?

A Yes.

Q All right. When you arrested Steve Howards, you charged – you had Mr. Winters charge him with harassment, not assault, is that correct?

A Well, I had my Colorado revised statute book with me, and I always keep it with me, and I was debating – I was flopping back and forth in my mind as to class three assault or harassment, harassment being Title 18, Article 3, Section 111 and essentially the wording of that statute was custom-made for this set of circumstances, makes it a class three misdemeanor, an arrestable offense in Colorado.

Q Is there some reason you didn't ask Vice President Cheney, "Hey, did this guy hit you?"

A I would love to have asked Vice President Cheney.

Q Why couldn't you?

A I'm not allowed access to the Vice [73] President.

Q Who says you're not allowed access. I mean –

A Special Agent in Charge Lon Garner.

Q What does he say about it?

A Well, at one point Deputy Winters told Lon Garner, "At some point, Mr. Garner" – this is at the jail, a couple hours after the fact, "Mr. Garner, we – we really do need to interview the Vice President," and, you know, get his rendition of events, and of course I remember Mr. Garner looking at Vice – excuse me, Doug Winters, you know, kind of gave him an incredulous look like, "You've got to be kidding me." That was the impression of the look, something to that effect.

Q Okay. All right. So it's simply policy, but no – no other explanation for you can't talk to the Vice President?

A Right. I could definitely tell by Mr. Garner's body language that that wasn't going to be permitted.

[74] Q Did you talk about that with Mr. Winters after the fact? Did Winters say to you, "Hey, how are we supposed to figure out what happened when we can't talk to the victim of the crime?"

A Certainly there was conversation.

Q What was the conversation you had with Winters about that?

A I – I basically said, "Doug, you know what, I can only do what I can do here. If they're not going to

allow us access, it's not going to happen. There's nothing I can do about it."

Q How do you go about getting access to the Vice President?

A I don't know. I guess through the chain of command.

Q You've got to go up through the chain of command?

A Perhaps through the chain of command.

Q And if Lon Garner is there at the Eagle County Jail saying it ain't going to happen, then it ain't going to happen, right?

[75] A It ain't going to happen.

Q Okay. Are you in Guam as a result of any of this?

A No. I – I wanted to go to Guam.

Q Okay. All right.

MR. GILLIGAN: Guam is a lovely place.

MR. LANE: I imagine it. It's close to Hawaii, it's a tropical island in the Pacific.

(Discussion off the record)

BY MR. LANE:

Q Have you talked to Agent Doyle about all of this since it happened?

A Yes.

MR. GALLAGHER: Let – let me counsel you not to reveal the substantive communications you've had with Agent Doyle in the presence of counsel.

THE WITNESS: Yes.

BY MR. LANE:

Q Okay. And let me just ask. You are counsel to Doyle and Reichle, is that right?

MR. GALLAGHER: Yes.

[76] MR. LANE: Okay.

MR. GALLAGHER: As is Mr. Noon.

MR. LANE: Okay. That's fine.

BY MR. LANE:

Q Yeah, I mean, just – without – I'm not talking about conversations where the both of you have sat down with your lawyer, but just you and Doyle talking about this.

A You know what? I pretty much just let it go after the fact. I didn't initiate any more contact with Agent Doyle until actually this lawsuit became evident approximately October 3rd of – of '06.

At that point I gave Dan a call and say, "Hey, you know what, this thing is going forward civilly." And that's pretty much it. I just let him know – I advised

him of the fact that he, you know, may be called as a witness later on –

Q Okay.

A – and that was essentially it.

Q Well, you used to work in the Denver field office?

[77] A Yes.

Q And Doyle used to work in the Denver field office?

A Yes.

Q Okay. And all these other guys were on the protective detail out of Washington?

A Well, for example – you've got a hodgepodge. For example, Agent Daniels, I believe he's still with Detroit.

Q Michigan. All right. All right. Do you know whether Doyle ever talked to you about him having any interactions with Daniels or McLaughlin?

A I don't recall that, no.

Q Did you ever write a formal complaint about all of this?

A No.

Q Why not?

A I certainly expressed my concerns to Special Agent in Charge Lon Garner. And I think he had empathy for me, but he said, "Gus, just let it go. Just let it go."

* * *

[82] A Not necessarily.

Q The radio communication to you is somebody needs to be interviewed, right?

A Yes.

Q It was not somebody needs to be arrested, correct?

A That's correct.

Q All right. Because presumably if somebody needed to be arrested, other agents would be physically holding that person awaiting your arrival. Would you agree with that?

A I want you to understand not everybody had access to the same information. Those shift agents didn't know – weren't privy to the information that Mr. Howards was on a cell phone whom stated allegedly, "I'm going to go ask him how many kids he's killed today." That certainly is an important element. That proves that he approached Cheney with malicious intent.

Those shift agents didn't know that. They had no aware that that conversation took place. But that's a

very important factor in my [83] decision of making a probably cause arrest.

Q Except do you know what he said to the Vice President when he did approach the Vice President?

A Do I – no. All – the only thing that I knew is that – what Agent Doyle had indicated to me – and I want to stand corrected on this earlier. Agent Doyle had indicated that Mr. Howards had uttered something to Vice President Cheney, all right? Essentially – he didn't know what was said, but he could hear some inaudible mumbling, okay?

Earlier I referred to that Agent Doyle heard something about Iraq. I want to stand corrected on that. All Agent Doyle heard is there was some sort of mumbling, so something was conveyed to Vice President Cheney.

Q Did Agent Doyle explain that to you during the break we just took?

A No. It was after the fact that I recalled this.

Q Okay. So Agent Doyle heard that – that [84] he was going to talk to Cheney about Iraq. Doyle heard Howards on Howards' cell phone saying, "I'm going to tell – ask Cheney how many kids he's killed today"?

A Yes.

Q He then sees Howards go over to the Vice President, touch the Vice President, somehow –

A Once again, you say "touched," I say "unsolicited physical contact that was perceived in an aggressive and threatening nature."

Q He says something and then he walks away?

A Something inaudible and walks away. But remains in the area, with a bag, in an area that's unmagged.

Q When you made contact with Mr. Howards, where was the Vice President?

A He was approximately – I'm going to guess maybe 50 feet away.

Q Okay. Was there some reason you couldn't get an agent to stop the Vice President and say, "Hey, I need to ask the Vice President what [85] happened? Was that just something that's not done?"

A That's just not protocol.

Q So part of the reason that you made a determination that you had probable cause is based on the content of the words that Steve Howards was heard talking into his cell phone about, correct?

A That established his frame of mind.

Q And that helped you – that was part of the probable cause you had to make an arrest, is what he said that he's going to go ask Cheney how many kids he's killed?

A Yes.

Q Okay. Other than – did you make any effort to figure out whether there were any truly independent civilian witnesses not associated with the Vice President, not associated with the Secret Service, I'm talking about complete bystanders in the area?

A Hindsight being 20/20 I wish I would have had somebody to leave behind to talk to independent civilian witnesses, but I didn't have

* * *

[90] disappointed at the Secret Service in general.

Q Why?

A Well, because I don't think we could have – I – I thought my request to conduct a polygraph examination of everyone involved was a reasonable request based upon, you know, what had transpired. I – I didn't feel that that was an unreasonable request.

Q Do you think this is a situation where the Secret Service simply would rather let the whole thing go rather than risk having some agents fail polygraphs?

MR. GALLAGHER: Object to the form of the question.

MR. WESTFALL: Object as well.

MR. GILLIGAN: Same objection.

BY MR. LANE:

Q Go ahead.

A I can't speculate on that. I don't know what the Secret Service is thinking.

Q Well, is this an ostrich-like move, they're just going to put their heads in the sand [91] rather than confront the – the possibility that – that somebody may be lying about something here?

MR. GALLAGHER: Same objection.

MR. GILLIGAN: Same objection.

MR. WESTFALL: Same objection.

BY MR. LANE:

Q Go ahead.

A I don't know.

Q I understand. But this goes back to where we were before. You've been in the Secret Service, I haven't. Is that your best reasonable surmise as a result of your experiences with Secret Service?

A It's possible.

Q Any other reasons that you can think of?

MR. GALLAGHER: Again, same objection.

MR. WESTFALL: Same objection.

MR. GILLIGAN: Same objection.

BY MR. LANE:

Q Go ahead.

A No.

[92] Q Okay. Let's go through some of these exhibits. Exhibit 1 is the summons and complaint issued by Deputy Winters. Did Winters see anything that happened there to your knowledge?

A At some point I think Mr. Howards had already had the handcuffs on when he actually made his approach, although I can't say that for sure. But somewhere to the point where I had made the decision to make a probable cause arrest to the point where Mr. Howards was handcuffed, Mr. Winters did show up.

Q If you – you had probable cause to believe that Steve Howards committed an assault on the Vice President, why did you turn him over to state custody? Why didn't you take him down to Denver and – and process him through federal custody?

A Well, because if I recall at the time I think it was Friday afternoon. We were 100 miles from downtown Denver. If I can't get a suspect to the marshals by 2:00 p.m., you know, he has to wait till the following day.

[93] With that in mind, I made a decision let's go ahead and transport him to the Eagle County Sheriff's Office. We can always file a state charge, which would give me sufficient opportunity to make

numerous phone calls, one of those phone calls being the Assistant United States Attorney Jim Allison in Denver.

Q Understood. So without telling me what the conversation was with Mr. Allison, there came a time where you made a determination that federal charges were not going to be made, right?

A I didn't make that determination.

Q Okay. But the only charges you – you – you filed were through Winters, and they were state court harassment charges, is that right?

A That's not correct.

Q Did you file other charges?

A I – I did draft a complaint.

Q A federal complaint?

A Yes.

Q Okay.

A More than one.

[94] Q Okay. What was your belief in terms of what federal violations had occurred? What 18 US Code sections had been violated?

A Title 18, United States Code, Section 715 – excuse me, 1751, Subsection E.

Q Subsection A or E?

A E. E as in Edward. And Title 18, United States Code, Section 111, resisting arrest.

Q And the 1751 E is assaulting the Vice President?

A Yes.

Q Ultimately did you ever talk to Mr. Hurlbert about these charges?

A I don't know who Mr. Hurlbert is.

Q He's the district attorney in Eagle County.

A I never talked to him.

Q Okay. Do you know why the harassment charges were dismissed?

MR. GALLAGHER: Let me object to that question to the extent that it would cause you to reveal information that you had learned from the [95] United States Attorney's office or anyone acting in a representative capacity of the United States Secret Service.

MR. GILLIGAN: I join in that objection.

THE WITNESS: I concur with my counsel.

BY MR. LANE:

Q Well, he's just objecting, and I don't want you to tell me anything lawyers have told you, but just yes or no, did there come a time when you found out

from whatever source that the Eagle County charges were dismissed?

A At some point, yes, I did discover that.

Q Okay. And were you curious as to why the Eagle County charges were dismissed?

A No.

Q Did you ever take any steps to ascertain why the DA in Eagle County dismissed these charges?

A No.

Q Okay. And you also – you are also aware that no federal charges of any kind were ever filed? There was no indictment ever –

[96] A That's correct.

Q There – there was never a case presented to any grand jury?

A A criminal complaint form there was.

Q A criminal complaint got drafted, but nothing ever went to a grand jury?

A Correct.

Q Okay. Exhibit 2 is an incident report from – from Eagle County, and this was filled out by Doug Winters, is that correct?

A It indicates so, yes.

Q And it indicates that the victim of this crime is Richard Cheney, is that right, about a third of the way down on the left?

A Yes.

Q All right. And do you know whether Mr. Winters – I think you testified that – that he was talking to Lon Garner about wanting to interview the victim of this offense, is that correct?

A Yes.

Q Okay. And page 2 of this report, which [97] is Howards' Bates-stamp 7, is also filled out by – is this filled out by you or is this filled out by Winters?

A Must have been filled out by Winters.

Q Okay. I think it was.

It says here that Winters – at the bottom of that page 7 into page 8 – patted Howards down for any weapons and illegal contraband. And are you aware of – were you present when he was patting him down?

A I patted down Mr. Howards.

Q Okay.

A Yes. And – and at that point certainly Doug was there with me, so we were really side by side. We – it was a joint pat-down.

Q Okay. Are you trained to be careful from your days at CSP when you reach into a suspect's pocket to empty them?

A Yes.

Q And you're trained to be careful of needles, aren't you?

A Yes.

* * *

EXHIBIT E – DOYLE DEPO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

STEVEN HOWARDS, Plaintiff, vs. VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity, et. ano., Defendants.	:	Case No. 06-CV-01964-WYD-CBS

Washington, D.C.

Friday, December 7, 2007

Videotaped Deposition of:

SPECIAL AGENT DANIEL DOYLE

called for oral examination by counsel for Plaintiff, pursuant to notice, at Hogan & Hartson, L.L.P., 555 13th Street, Northwest, Washington, D.C., before Shari R. Broussard, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at 8:14 a.m., when were present on behalf of the respective parties:

* * *

[14] pretend to be Vice President Cheney.

MR. GALLAGHER: Sure.

BY MR. LANE:

Q And – and why don't you demonstrate for us on videotape what you saw Steve Howards do to the Vice President.

A Do you have any objections with me touching you, first of all (referring to Mr. Gallagher)?

MR. GALLAGHER: That's fine.

MR. LANE: This is a consensual touching isn't it, Mr. Gallagher?

MR. GALLAGHER: Yeah, I'll stipulate to it just once.

THE WITNESS: Mr. Howard approached Mr. Cheney from about the 2:00 o'clock to 3:00 o'clock position.

BY MR. LANE:

Q Okay. Well, show us – step back away from the table in case –

A Okay.

Q – this gets violent.

[15] A Mr. Howard approached from about this angle (indicating).

Q Okay.

A There were some small children in front of the Vice President. Mr. Howard reached in and struck the Vice President.

Q Show me how.

A (Indicating). It was hard enough where the Vice President's shoulder dipped and the Vice President looked up at Mr. Howard in surprise.

Q Okay. So it wasn't the – you would agree that what you've done is different than what Reichle did and what Daniels and McLaughlin did in this demonstration?

MR. WESTFALL: Objection to form.

BY MR. LANE:

Q You'd – you would agree that there are basically three scenarios that we now have?

MR. WESTFALL: Objection. Form.

BY MR. LANE:

Q You got the Reichle come from behind strike, that's one, correct? You saw that?

[16] A That – that's what you're stating, yes.

Q Okay. And then we have the Daniels, McLaughlin face-to-face slap on the shoulder?

MR. WESTFALL: Objection. Form.

BY MR. LANE:

Q That's the second scenario we have here; is that correct?

MR. GALLAGHER: I'm going to object to the characterization, but you can answer the question if you can.

THE WITNESS: That's your opinion, correct.

BY MR. LANE:

Q Well, I can always say what my opinion is, but I'm asking you isn't that basically what you saw. I'm going to ask you to characterize what you saw McDaniel, or McLaughlin and Daniels do. I'm calling it a face-to-face slap on the shoulder.

A I disagree with that. It wasn't –

MR. WESTFALL: Just so we're clear on the question, you're – you're asking for his characterization –

[17] BY MR. LANE:

Q Yeah, I want – I want you – do you agree –

MR. WESTFALL: – of what my client said?

BY MR. LANE:

Q Yeah. Do you agree with that characterization?

A I don't believe it was face to face. It was from a, approximately, about a 3:00 o'clock position.

Q Okay. Did you demo for Reichle what he showed us that you demoed for him last time we were sitting for depositions?

A Prior to the deposition?

Q On scene. You heard –

A Yes –

Q – Reichle –

A – I did.

Q – testify that on scene he asked you what happened, you did the demo that he showed us in his deposition.

A Yes.

* * *

[46] he was still on his cell phone. And at that point I heard him say "I'm going to ask him how many kids he's killed today."

Q And what did you take that to mean?

A I took that to mean that there was a demeanor about him that wasn't healthy and that we need to keep an eye on him.

Q What wasn't healthy about his demeanor?

A Somebody that would actually physically go up to the Vice President and make that statement just, just wasn't quite right as far as – as far as his motions, his rapid movement throughout the crowd. He had a large bag with him. There was – there was just something that deemed that the Secret Service kind of needed to keep an eye on him.

Q Okay. What about the content of what he said, what was it about the content that disturbed you?

A It disturbed me that it showed that there was some type of malice possibly.

Q What did you take the statement "I'm [47] going to ask him how many kids he's killed today," what did you take that to mean?

A I took that to mean that possibly things could escalate a little bit further if his demeanor was of that – by stating – by making that statement.

Q No, but I'm – I'm not asking you about your Secret Service concerns. I'm asking you just when you heard those words, what did you understand them to mean?

A I understood them to mean that he's going to approach the Vice President and ask him how many kids he's going to kill today.

Q Well, if you had heard him say I'm going to approach the Vice President and congratulate him on his wildly successful career as Vice President, that carries one meaning, and I'm going to go ask the Vice President how many kids he's killed today has another meaning, right?

A Correct.

Q Okay. What do you mean – what did you understand the words "I'm going to ask him how

many [48] kids he's killed today," what did you – what did you think that was referring to?

A I – I thought it was referring to the war in Iraq.

Q Okay. And did you take that as a statement by Mr. Howards that he was obviously against this administration's policy in Iraq because it's resulting in kids being killed?

A I don't know what his opinion is of the war.

Q Did you take this as a statement of support for the Vice President's policies in Iraq or a statement of criticism about the Vice President's policies in Iraq?

A I took it possibly as a criticism.

Q Okay. Why did you take it that way?

A Because of his – his words, first of all, and his physical actions.

Q Okay. What did you observe then or what did you do then?

A At that point when I heard the statement, I approached the two CSU agents and told [49] Mr. McLaughlin that I heard this individual – individual say that he's going to ask the Vice President how many kids he's killed today. And at that time three of us kept a surveillance on the individual.

Q And who are these three?

A Myself, Daniels and McLaughlin.

Q Okay. What happened then?

A I still noticed that he was acting very erratic within the crowd and he was moving around the crowd very quickly. And then – and then at that point he broke in a – in a fast walk towards the Vice President. At that time the Vice President had a couple kids standing in front of him. The Vice President was shaking their hands and taking some photographs with the crowd and Mr. Howard reached in in about the 3:00 o'clock position and abruptly slapped the Vice President on his right shoulder.

When he did slap the Vice President, the Vice President shoulder's did drop, it took the Vice President by surprise, and I saw Mr. Howards [50] make a statement. I don't know what statement he made to the Vice President.

At that time he peeled off of the Vice President rather abruptly and he still hung around the area where the Vice President was. And at that time the ID agent, Mr. Reichle, was notified.

Q When you say he peeled off from the Vice President, he didn't run away, did he?

A He – he moved away quickly. All his movements were very quick and erratic.

Q And how far – well, quick and erratic. What does erratic mean?

A He had no set line to follow. He was moving in and out of the crowd, was just very erratic in his movement.

Q Okay. When you say he was still hanging around in the area, how far from the Vice President did he move away?

A At his furtherest point I don't think he was any further than 20 yards away from the Vice President.

Q Okay. So you then – did you notify [51] *Reichle*?

A When the incident took place, I don't remember who notified. I possibly could have through the security room or notified him directly, but I remember that he was notified.

Q Okay. And Reichle then comes on scene?

A That's correct.

Q Did you see that happen? Did you see Reichle arrive?

A Yes, I did.

Q Were you monitoring the Vice President's movements at that time as well as Mr. Howards'?

A *To the best of my ability, yes.*

Q All right. What happened then?

A Mr. Reichle was approached by a couple of the Vice President detail agents. I don't know what the conversation was. Gus came up to me and asked what happened. I explained quickly what took place and demonstrated what took place.

Q Let me stop you right there. Were Daniel and McLaughlin standing there in close proximity while you were demoing for Reichle what happened?

[52] A I – I couldn't answer that. I don't know.

Q Okay.

A I knew they were in the area, but I don't know if they were –

Q Okay.

A – in that –

Q You heard Reichle testify that they were. Do you recall that?

A Their testimony?

Q Reichle testified at his depo that these guys, McLaughlin and Daniel, were there and saw you demo what you demoed.

MR. WESTFALL: Objection. Form and characterization.

THE WITNESS: If that's what his –

BY MR. LANE:

Q Do you remember that?

A Yes, I remember him stating that in his testimony.

Q Okay. And do you dispute that they were there or you just simply don't know?

[53] A I just don't know.

Q Okay. All right. So you did the demo for Reichle that you showed us with Mr. Gallagher's kind assistance earlier; is that correct?

A That's correct.

Q All right. What happened then?

A At that point we identified Mr. Howard to Mr. Reichle. Mr. Reichle approached Mr. Howard, identified himself.

Q Were you in proximity to all this? Is this your own observation?

A Yes, these are my own observations.

Q How close to you – how close to you was all this happening?

A Oh, probably within definitely 10 feet.

Q Okay.

A Mr. Reichle identified himself, I saw him show his credentials, and asked Mr. Howard if he

would ask some questions – answer some questions for Mr. Reichle. I didn't hear his exact – exact response, but I knew he was very frustrated at that point and I did –

* * *

[86] characterization.

MR. GALLAGHER: Objection. Form.

MR. GILLIGAN: Join.

THE WITNESS: I think the Vice President doesn't know the total circumstances that existed prior to the assault and after the assault.

BY MR. LANE:

Q Tell me what the circumstances prior to and after the assault were that made this touching by Steve Howards an assault.

A Because in my opinion we are there to keep the Vice President safe and with – Mr. Howards' statement and actions showed malice and, therefore, Mr. Howards needed to be questioned about the assault that took place.

In my opinion the assault was something that a prudent person would not do as far as that touch went. It went way beyond what a friend or a football buddy would do to Mr. Cheney.

Q Had you heard Steve Howards on the cell phone saying oh, my God, it's Dick Cheney, he's the greatest living American, I want to go up and [87]

express my undying love to the Vice President, and he went up to the Vice President and slapped him on the back and went, Mr. Vice President, I just want you to know that I just think you're the greatest, man, keep up the good work, slaps him on the back a couple of times and walks away, would that be an assault in your mind?

MR. WESTFALL: Objection. Form.

MR. GALLAGHER: Same objection.

THE WITNESS: If the energy that he used to touch the Vice President the way he did, I would say it was an assault.

BY MR. LANE:

Q So basically what you're saying is regardless of what Steve Howards said on his cell phone before he touched the Vice President and regardless of what he did after he touched the Vice President, the physical act of what he did to the Vice President is the crime of assault?

MR. WESTFALL: Objection. Form.

THE WITNESS: That is correct.

BY MR. LANE:

[88] Q All right. Is it – is it consistent with your training that somebody who assaults the Vice President is permitted to remain free for five minutes after the assault?

A At that point I did not perceive another threat and I wanted to surveil him along with our countersurveillance unit. I wanted Mr. Reichle to be on scene to make the arrest because at that time my function would not allow me to make the arrest. I couldn't tie myself up in an arrest like that.

Q Did you call Reichle to the scene?

A As I stated earlier, I don't recall who did. I may have, I may not.

Q You've heard testimony from prior depositions that nobody called Reichle to the scene and asked for somebody to arrest Steve Howards, the call went out to talk to this guy, right?

A That's correct.

MR. WESTFALL: Objection. Form and characterization.

BY MR. LANE:

Q All right. You said you saw no further [89] evidence – let me – let me withdraw that question.

Can you, and I hate to ask you to do this, but can you read back what he said about he saw no further threat or something along those lines?

THE REPORTER: Where was it? Just now?

MR. LANE: Yeah, he just said it very recently. Keep going back. "At that point I did not perceive another threat."

THE REPORTER: If you're going to talk, it's going to go down –

MR. LANE: No, no, no, that's – that's it. No, no, no.

THE REPORTER: – so do you want me to read it or do you just want to look at it?

MR. LANE: No, I just want to look at it.

THE REPORTER: Okay.

MR. LANE: Okay. We're ready to go back.

THE REPORTER: Okay.

BY MR. LANE:

Okay. You just testified that at that

* * *

EXHIBIT ~~G~~ [F] - ~~LEE~~ [MCLAUGHLIN] DEPO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEVEN HOWARDS, Plaintiff, v. VIRGIL D. "GUS" REICHLE, JR., KRISTOPHER MISCHLONEY, DANIEL MCLAUGHLIN, DAN DOYLE, ADAM DANIELS, Individually and in Their Official Capacity. Defendants.	Case No: 06-CV-01964-WYD-CBS

*** CONFIDENTIAL ***

Washington, D.C.

Tuesday, November 27, 2007

Deposition of:

DANIEL MCLAUGHLIN

called for oral examination by counsel for Plaintiff, pursuant to Notice, at the Law Offices of Hogan & Hartson, 555 13th Street, Northwest, 12th Floor, Washington, D.C., before Mary E. Warner of Capital Reporting, sworn by a Notary Public in and for the District of Columbia, beginning at 8:09 a.m.

* * *

[30] A That's my best recollection.

Q That's fine. Where – how far away from the Vice President were you when you were observing Steve Howards' interaction with the Vice President?

A I was across the street from the storefront, so whatever the width of that street is, maybe be 40 – 40 feet maybe.

Q Okay.

A 50 feet.

Q Tell me what you saw.

A Well, I think – would you like me to go back and mention how Mr. Howards came to my attention?

Q Everything that you believe to be relevant, absolutely.

A Okay.

MR. GALLAGHER: I'm going to object to the form of that question.

BY MR. LANE:

Q Go ahead and answer.

A I – this was myself and Agent Daniels [31] were working as our counter surveillance function across the street. We were – we were just monitoring the crowd, and Agent Doyle approached us and said. "I just heard the guy over there in the green shirt say

he's going to ask the Vice President how many kids he had killed in Iraq, or something to that effect."

I said, "Okay." Because he's within his bounds to do that.

And so we maintained our position. And at that point Mr. Howards approached the Vice President, and from my position I could see Mr. Howards place his left hand on the Vice President's right shoulder as he was walking and met him right in the doorway.

And then he broke off from there and then returned back to what I presume was his family standing there. And then he walked off in the same direction as the Vice President.

Q Okay. Now, again, I'm not going to ask you for specifics, but presumably when Agent Doyle told you that the guy in the green shirt was going [32] to ask the Vice President about how many kids he had killed in Iraq, you took that as – you understood that to mean that this guy in the green shirt who was Mr. Howards was not necessarily a – a big fan of the Vice President's?

MR. WESTFALL: Objection to form.

MR. GALLAGHER: Same objection.

THE WITNESS: I – I really had no opinion as to what – what his feelings were politically other than –

MR. LANE: Well, part of your –

THE WITNESS: – what his statement would intone.

BY MR. LANE:

Q Part of your job is to recognize a threat against the Vice President, isn't it?

A Right. But Mr. Doyle telling me what he said is – is only a certain amount of information I had to work with. I – I then kept an eye on your client.

Q Right.

A I didn't approach him.

[33] Q But what I'm saying – and I'm just – this is not a trick question. Okay?

If you hear somebody say, "Oh my God, look, there's Dick Cheney, I love that man, I'm going to go shake his hand," you've got the mindset watching this person, generally, that likely a friend – a friendly type who is not going to be –

A That's not true.

Q I understand. Everybody's a threat at all times –

A Right.

Q – I understand you're trained that way. But I'm just suggesting to you that Agent Doyle came over and talked to you about Steve Howards, he didn't talk to you about anybody else in the crowd, did he? He just talked – talked about Steve Howards?

A Yes.

Q Okay. And that's because he heard something of concern to him that he wanted you to know about, right?

* * *

[66] Q Yeah.

A No.

Q When you say, "We don't know the whereabouts of the ID agent," I mean, is – is the ID agent the person that would have done the interview of Mr. Howards?

A Yes. His – his mission for that visit is – is to – is to deal with any intelligence concerns.

Q All right. Now, let me backtrack to your knowledge of the law generically.

A Uh-huh.

Q If Agent Reichle is the ID agent – well, first of all, have you ever worked as an ID agent?

A Yes, sir.

Q Okay. When you – as the ID agent, have you had the experience of wanting to interview someone?

A Not in this capacity, no.

Q Okay. It's your understanding based on your prior testimony – correct me if I'm wrong – that when the ID agent wants to interview a [67] civilian who

may have done something, that civilian is obligated to talk to the ID agent. Is that –

A You're saying this civilian who has put himself under what I would believe is the 18 USC 3056, the law which allows us to protect the President, Vice President, if – if they were to fall into that parameter?

Q Uh-huh.

A Yes, I believe they – they would be interviewed.

Q And they would be required to answer questions, is that correct?

A Yes.

Q And would they be arrested – in other words, is this an interview pursuant to a lawful arrest, or is this simply getting information from this person?

A I would – if the person is cooperative and does not escalate or become physically abusive, I – I would say it's just an interview. This – that person has – has agreed to – to [68] that interview.

Q And if that person doesn't agree to that interview, what happens then based on your training and experience?

A Doesn't interview, just says no? Or – or escalates it as the situation plays out?

Q Or simply says, "I'm not talking to you. Don't want to talk to you." And starts to walk away?

A I – from my experience and my –

Q Training?

A – training, I would say that person at the very minimum would be followed to their vehicle, so we would know their – their vehicle information, and then somebody would probably be continuing to follow them, talk to them, go to their home until – until it could be determined what – what was this person trying to do during that event that called them to the – to our, you know – what's the word I'm looking for – our – coming into our zone of protection and then being a person of interest to us.

[69] Q Okay. Based on your training and experience, did you witness Steve Howards commit any crime in his interactions with the Vice President on the day in question?

A From my position?

Q Yes.

A I – I witnessed what – what I demonstrated to you.

Q Right.

A Do I know for certain that he assaulted the Vice President? No.

Q Did you have probable cause to believe in your mind that on the day in question Steve Howards had committed any crime in his interactions with the Vice President?

A From my personal knowledge?

Q From your personal knowledge.

A No, sir.

Q All right. From your training and experience, did you believe that Agent Wurst and Rosalis acted inappropriately in any way in allowing Steve Howards to interact with the

* * *

[86] Q Understood. But from what you saw, you didn't see anything in the touch that gave you probable cause to believe that he had committed any crime at all, right?

A I – I thought it was very forceful the way he contacted the Vice President's body. Was it a crime?

Q Yeah.

A I'm – I'm uncertain of that. I couldn't tell you.

Q Okay. So based on your uncertainty, you understand if you're uncertain, that is not probable cause, is it?

MR. WESTFALL: Objection, form.

MR. GALLAGHER: Same objection.

BY MR. LANE:

Q You don't know if there's probable cause or not, do you, if you're uncertain?

A I didn't make the decision to arrest him.

Q That's had not my question. You understand as a law enforcement officer charged with enforcing the law that you need probable [87] cause before you can arrest somebody, correct?

A Correct.

Q All right. Based on what you saw, you had no probable cause to believe Steve Howards had done anything warranting an arrest, correct?

A Correct. But I know that I only saw partially what was going on. I just want to –

Q I understand.

A I understand, sir, but we're having a conversation, like you said.

Q Okay. That's good. All right. So everything you're telling me is that you, as an eyewitness to this incident with a limited view, saw nothing that Steve Howards did that would have given any law enforcement officer probable cause to believe he had committed any offense –

MR. GALLAGHER: Objection to the form.

MR. WESTFALL: Objection to the form.

BY MR. LANE:

Q – based on your observations?

A Again, from my proximity of –

Q Yes.

[88] A – the encounter –

Q Yes.

A – I can only say I would agree 100 percent that he should have been interviewed. Should he have been arrested, I did not have enough information to go that far.

Q And if he is being interviewed, or – or an agent tries to interview him and Steve Howards says, "Go fuck yourself," you believe that is enough to arrest him at that point, is that correct?

A I would detain him.

Q Detain him and do what?

A Well, I would have told your client that we needed to approach this situation as adults first off –

Q Right.

A – and we don't need to be cursing at each other.

Q Right.

A And then I would have tried to have a civil conversation with him.

[89] Q Correct.

A He – when – when encountered by Agent Reichle, Mr. Howards escalated extremely quickly, became agitated, and was abusive.

Q Right. And so he – he got arrested for that?

A No. He was no longer having a civil discourse with Agent Reichle –

Q Right.

A – regarding –

Q I guess –

A – what had transpired.

Q I guess what my question is, is, is it your understanding of the Constitution that Steve Howards in that situation did or did not have a First Amendment right to tell Reichle to go fuck himself?

MR. WESTFALL: Objection, form.

A No, because he had volunteered himself into the Secret Services Zone of Protection under 18 3056 again. He, you know, encountered the Vice President, said what he needed to say, and

* * *

[Mr. Lane:] [130] him on scene, seemed to differ from the demonstrations given by Agents McLaughlin and Daniels earlier today. I'd like to clarify that.

The area of inquiry regarding whether Agent McLaughlin did in fact tell Agent Reichle that there was no assault in a phone call and then ultimately hung up on Agent Reichle. I'm going to ask questions about, well, if that was in fact the case and they were present when Agent Reichle said, "You're under arrest for assaulting the Vice President," why they didn't pipe up and say, "No, he didn't assault the Vice President."

And Reichle indicated that he believed perhaps that he asked Agent McLaughlin, "Are you being pressured to change your testimony?" And Agent McLaughlin hung up on him rather than responding. That's my recollection of what Agent Reichle said. I want to ask these gentlemen questions about areas of those inquiry.

MR. WESTFALL: This is Richard Westfall on behalf of Agents McLaughlin and Daniels. Generally when I deposition is closed, it [131] is closed. Subsequent depositions, subsequent discovery raises interesting areas of inquiry or areas where a lawyer may say, "Boy, I wish I asked that question had I known this particular fact," that doesn't normally lead to reopening previous depositions once they have been closed.

Under the circumstances, we are all here in Denver. We have –

MR. GILLIGAN: Washington, actually.

MR. WESTFALL: Excuse me, in Washington, I'm sorry. Thank you. We're all here in Washington. People from – people from Denver are here. People from the Justice Department are here. We have court reporters here. And in light of the fact that there were a couple areas along the lines that Mr. Lane talked about that may or may not upon motion to the Federal Court allow for additional testimony into those areas and given the expediency of the situation in light of the fact that we all are here in Washington, I – I believe that it's acceptable to both – both of my clients to allow [132] this very limited additional inquiry and allow their testimony to be – or their deposition testimony to be reopened for this, for the narrow purposes of taking the additional testimony outlined by Mr. Lane.

MR. LANE: I appreciate that consideration, Mr. Westfall. Thank you.

So, Agent McLaughlin –

BY MR. LANE:

Q Agent McLaughlin, you're still under oath from your prior testimony. You understand that?

A Yes, sir.

Q All right. You've sat through Mr. Reichle's deposition, is that correct?

A That's correct.

Q And you heard him describe the demo that Agent Doyle gave him while you were observing, is that correct?

A Yes.

Q Was that an accurate demonstration of what Agent Doyle did?

A No, I never witnessed a demonstration by [133] Agent Doyle.

Q All right. You saw the demonstration that Agent Reichle gave in his deposition just now, correct?

A Correct.

Q And he – he claims that Doyle said in essence that Howards came up behind Cheney from the 5:00 position and basically gave him a sharp strike on the shoulder. You saw at that demo, right?

A Yes, I did.

Q Is that a fair and accurate verbalization of what we both saw Agent Reichle do just when he was being deposed?

A That's what he demonstrated.

Q All right. Did you ever – was that an accurate description of what you saw Steve Howards do to the Vice President?

A No.

Q All right. Are – are you staying with your rendition of what you saw based on your prior testimony?

[134] A That is my previous testimony, yes.

Q Okay. You were present when Agent Reichle put Mr. Howards under arrest and announced, "You are under arrest for assaulting the Vice President"?

A Yes.

Q All right. You also heard Agent Reichle testify that he – he got a phone call from you later and you said there was no assault?

A No, sir, he called me.

Q He called you. Did you tell him in that phone call there was no assault?

A No, there were two conversations. The phone call was Agent Reichle calling me and I answered the phone. And Agent Reichle said, "I need you to change your statement," to which I responded, "What?" And he said, "I need you to change your statement, your story and mine are not the same." I said, "My statement is what I recollect from what I participated in. We're not having this conversation." Then I hung up on him.

Q Did you believe that – well, that was [135] one conversation, what was your next conversation?

A The next conversation was the next morning when I was leaving the hotel for work, Agent Reichle

was waiting for me outside, and approached me and said, "That the Vice President's detail is involved in a cover up." I said, "What are you talking about and he said you guys are involved in a cover up"? And then I don't recall exactly what he had to say after that. And then followed by, "You need to have a meeting with myself and my supervisor today." And I said, "Absolutely as long as my supervisor is notified, I'll meet with you." And that never came about.

Q Did you understand what he meant when he said, "The Vice President's security detail is involved in a cover up"?

A No.

Q Weren't you curious?

A No, I – I thought that he had taken a giant leap away from his good senses at that point. The day before, he – he made the announcement that he was going to arrest [136] Mr. Howards based on information that he had. As I testified earlier, he was wearing a radio, I was not. I was not privy to any further information that he may have had.

So when he made a decision to arrest and your client resisted, I intervened for if nothing more than officer safety purposes as well the safety of your client.

Q Understood. Did you believe that Agent Reichle was telling you in essence, "I want you to commit the crime of making false statements in an officially filed Secret Service document"?

A When he made the phone call, that's what I – I interpreted it as, that was unethical.

Q Not just unethical but illegal?

A Yes, sir.

Q All right. Did you question him further about his intentions?

A I wasn't even going to honor that – that conversation to – to continue.

Q Are you – well, I mean, let me ask you this way, all right: You are a law enforcement [137] officer, is that correct?

A Yes, sir.

Q You believed Agent Reichle was asking you to commit a crime, is that correct?

A Yes.

Q All right. You then had probable cause that he was attempting to solicit you to commit a crime, is that correct?

A I didn't give it that much thought. I notified my superiors and that was it.

Q You notified your superiors that Agent Reichle was –

A I – I called my immediate supervisor and said, "I think you need to know that Agent Reichle

just called me and asked me to change my statement."

Q Not just change your statement, but falsify your statement, is that correct?

A No, he said change your statement. He didn't say – he didn't use the word falsify.

Q Did he tell you in what context he wanted you to change your statement?

* * *

EXHIBIT G - LEE DEPO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CIVIL ACTION NO.: 06-CV-01964-WYD-CBS

TELEPHONE DEPOSITION OF SPECIAL AGENT MIKE LEE
EXAMINATION DATE: June 17, 2008

STEVEN HOWARDS,

Plaintiff,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity;
KRISTOPHER MISCHLONEY, in his individual and official capacity;
DANIEL McLAUGHLIN, in his individual and official capacity;
DAN DOYLE, in his individual and official capacity;
ADAM DANIELS, in his individual and official capacity;

Defendants.

PURSUANT TO NOTICE, the telephone deposition of SPECIAL AGENT MIKE LEE was taken at 2:02 p.m. on June 17, 2008, at 1543 Champa Street, Suite 400, Denver, Colorado, before Diane M. Overstreet, Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of Colorado, said deposition being taken pursuant to the Federal Rules of Civil Procedure.

* * *

[10] article that there are accusations out there from some agents that other agents may have violated federal laws?

MR. GILLIGAN: Objection, form.

A Yes, I understand that there's some confusion or different views of what happened that day, yes, sir.

Q (BY MR. LANE) But I'm asking you specifically, do you understand from reading the article that some agents have accused other agents of violating federal statutes?

A MALE VOICE: Objection, form.

A No, I didn't really read that much into it. I'm sorry.

THE REPORTER: Is that Mr. Gilligan objecting?

MR. LANE: Whoever raises the first objection, give your name, and then we'll just note that that's the actual speaking party, but we'll attribute the objection to everyone.

MR. WESTFALL: Objection, form, Westfall.

Q (BY MR. LANE) Okay. Do you understand that there are allegations raised that agents are accusing one another of violating [11] federal laws?

MR. WESTFALL: Same. Westfall.

A I understand somewhat, yes, sir.

Q (BY MR. LANE) Okay. Were you on scene at Beaver Creek when this incident occurred?

A Yes, sir.

Q Where were you?

A I was – well, I was a special agent in charge of the Vice President's detail on duty that day, and I was working in close proximity to the Vice President.

Q When you say "close proximity to the Vice President," what does that mean?

A That means I was right next to his right shoulder.

Q Okay. Did you notice an incident involving Steve Howards?

A That is your client, correct?

Q That is correct.

A Yes, sir.

Q What did you notice?

A To put it in context that day, we were shopping in the mall there, going in and out of stores. People were approaching the Vice President and shaking his hand, which is pretty [12] customary, taking pictures, and kids were approaching, adults, pictures, autographs.

While we were – after we exited a store, we had stopped for a moment and we were talking to someone. I believe the Vice President stopped and his granddaughter was at his – well, right below him. And I noticed to my left a white male approaching towards us. Again, not uncommon for that environment. And –

Q Let me just interrupt you real fast. Was there anything that caused you to notice him other than you're paid to notice everything and everyone?

A Nothing – no, just that he was coming toward the Vice President. I looked up, I looked at his hands, didn't see anything in them. So I went ahead and let him continue to approach.

Q Okay.

A Once he got next in front of the Vice President, I can't recall if he shook the Vice President's hand with his right hand, but I know for sure that he tapped the Vice President's left shoulder to get his attention.

Q Okay. Now, this is a very important issue here.

[13] A Sure.

Q When you say "he tapped the Vice President's shoulder," obviously I don't have a video conference going on, and I'm going to have to ask you in excruciating detail to describe to me what you mean when you say "he tapped the Vice President's shoulder."

A Sure. And this is how I would describe this. It wouldn't be a rub, like you're rubbing a baby's head, and it wouldn't be a full, you know, front shove. I kind of describe it as you're at a loud concert or a baseball game, you're trying to get the person next to you's attention.

Q Okay.

A Does that help you at all?

Q That helps. So it's basically sort of a pat; is that right?

A No, sir.

Q Okay.

A It was not a pat. What I said was if you're at a loud concert and you're trying to get somebody's attention to talk to them – it's not a pat and it wasn't a shove.

Q So is it like he used his index finger or a couple of fingers and just went up and [14] down on the Vice President's shoulder?

A No, sir.

MR. GILLIGAN: I caution the witness, let counsel ask the question before you answer. That was Gilligan.

Q (BY MR. LANE) Okay. Describe what part of his hand did he use to touch the Vice President's shoulder.

A It was more the palm, sir.

Q Okay. And he kind of just laid it on?

A No, sir.

Q Describe the action.

A It was like you were trying to get someone's attention in a loud environment and they can't hear you so you use a physical touch – and this was more than a touch – to get their attention so you can say something to them.

Q Okay. Did it appear to you that there was a crime committed when he did whatever it was that you've just described?

A At that time, no, sir, not to me.

Q Okay. Did it appear to be a polite kind of an "Excuse me, let me get your attention" kind of a touch?

[15] A I'm not sure I would use the word "polite," but it was a get-your-attention-type touch, yes, sir.

Q Okay. I mean, there was nothing that an ordinary person would deem offensive about that laying on of a hand, would there?

MR. WESTFALL: Objection, form, Westfall.

A In my experience, I wouldn't call it offensive, but I would call it unusual for someone that doesn't

know the Vice President to come up and touch him, except to shake his hand.

Q (BY MR. LANE) Let me ask you about that. When you said people were posing for pictures with the Vice President and shaking his hand, were people posing with their arms, for example, around the Vice President's shoulder?

A Some were, some were not.

Q Okay. That's not unusual, is it?

A That's not unusual, but whenever I'm with the Vice President, I don't like to relinquish control of somebody holding on to him, so I kind of – I discourage that.

Q Right. When you say you discourage it, do you just kind of tell people like "hands [16] off" gently or –

A Yes, sir. Exactly.

Q Okay. And now how long was Steve Howards physically touching the Vice President's shoulder?

A It may have been a second, if that, sir.

Q Now, obviously, had you perceived that as a threatening gesture, you would have immediately taken steps to get control of Steve Howards and get the Vice President out of there, right?

A Absolutely.

Q That didn't happen, did it?

A No, sir.

Q Because you didn't perceive it to be a threatening gesture of any particular significance, right?

A I didn't perceive it to be a threat, no, sir.

Q Okay. Did you hear any interactions between Steve Howards and the Vice President?

A Not from the Vice President. From Mr. Howard, yes, sir.

Q What did you hear Mr. Howards say?

[17] A I'm paraphrasing it somewhat, sir, but something to the effect that "You guys messed up Iraq" or something like that. "You're messing up in Iraq" or "You guys messed up Iraq."

Q Did the Vice President respond?

A Not that I know of, no.

Q How long – I mean, did the Vice President look at Steve Howards while Steve Howards was making that comment?

A Yes, sir, he looked up when Mr. Howard touched him and made the comment, and then Mr. Howard walked away.

Q Okay. Was this whole incident of any particular significance to you?

A Again, it was significant in that were used to people protesting or making a comment about Iraq.

That's not – that wasn't uncommon. But for someone to come over right into his space like that and make that comment, to be quite honest with you, sir, it was the first time I had ever seen it.

Q Okay. So it was sort of a bold thing to do but – and unusual, but not of such concern that you felt the need to do anything about it, right?

[18] A Your words are correct. It was bold, yes, sir.

Q Okay. Did you do anything at all about it once Mr. Howards started to walk away?

A The event kind of continued after that. Once Mr. Howard left, my assistant special agent in charge approached me and –

Q Who was that?

A Andy Wurst.

Q Okay.

A – and asked me did we want to basically have an ID team just keep an eye on Mr. – is it Howard or Howards?

Q Howards, plural, with an S.

A – Howards to leave the area. And I think my words were "Yes, absolutely."

Q Okay. And that's probably standard operating procedure when there's a possible threat somewhere, right?

A Yes, sir. We just – at that point I just wasn't sure, and I'd rather keep an eye on that situation until we leave the area.

Q Sure. So you said yes. What happened then?

A We – I believe we stayed in the [19] area for another five minutes. We walked to the cars. I believe we took some pictures with the police officers, and then we departed from the hotel, sir.

Q Okay. Now, you are a certified law enforcement officer; is that correct?

A Yes, sir.

Q And you're basically, when you're doing that kind of work, your one job is to protect the Vice President of the United States; is that correct?

A Yes, sir.

Q And if you had probable cause to believe that an assault had been committed on the Vice President of the United States in your presence, you would have immediately taken steps to both protect the Vice President and apprehend the person who has assaulted him; is that correct?

A Yes, sir.

Q Okay. You did not take any unusual actions other than asking Agent Wurst, "Hey, keep an eye on that guy," right?

A Yes, sir.

Q Okay. And is it fair to then say that you did not have probable cause to believe [20] that Steve Howards had committed any crime in your presence?

A I didn't believe that an assault had taken place in my presence, no, sir.

Q Okay. Did you have occasion to talk to the Vice President about the incident?

A Not at all, sir.

Q Did you ever hear that the Vice President made any comments about the incident with Steve Howards?

A Not at all, sir.

Q Okay. Did the Vice President seem upset, alarmed, annoyed, or in any way bothered by his encounter with Steve Howards?

A No, sir.

Q At some point after this incident occurred, is it your understanding that Steve Howards was arrested by agents of the Secret Service?

A Yes, sir.

Q Will you describe how it is that you found out after the fact that Steve Howards had been arrested by agents of the Secret Service?

A We returned to the hotel we were staying at – I think it was the Ritz – and got [21] the Vice President back to his suite. And I was downstairs having

lunch. And I received a call to contact the director of the Secret Service –

Q Who was that?

A Mark Sullivan. – in regards to an incident that happened in Beaver Creek.

Q All right. So what did you do?

A I called the director.

Q And how long after the fact was this phone call?

A From the time we left, sir, to the phone call?

Q Yes. Well, actually from the time of the touching to the time of the phone call, approximately. And I know you don't have a stopwatch on it, so give me your best guess.

A I would say no more than 45 minutes.

Q Okay.

A No more than 45 minutes, I would say.

Q All right. So you get this message to call Director Sullivan. What do you do?

A I called him, and I believe he asked me – again, this is a long time ago, you know – was the – he heard that the Vice President was [22] assaulted – was assaulted at the – in Beaver Creek, and to describe what happened. So I described as I described to you what happened, and that was it.

Q Okay. Did he have any comments to you about, well, why did this guy get arrested if that's all that happened?

A No. he didn't. He just said, "Thanks for the information," and that was it.

Q Did you ever write any reports or did you take any notes on this entire affair?

A No, sir.

Q Okay. All right. So you talked to Director Sullivan approximately 45 minutes after the fact, and you tell him what you told him. What was your next information regarding the arrest of Steve Howards?

A Well, at that point, after I had spoken to the director, I believe at the same time Lon Garner, who was the special agent in charge of the Denver office, got ahold of the arresting agents to get the specifics of what happened.

Q Okay. Now, how do you know that?

A Well, I mean, Lon was with me at lunch, sir. I'm sorry. Lon was with me at lunch [23] when we first got notified that the director wanted me to call. So at that point Lon reached out for the agent to get the particulars of the case.

Q Okay. And did you talk to Lon about what he was learning about what had occurred?

A No. Lon spoke to – is it Reichle?

Q Reichle.

A And at that point I kind of was removed from the situation because I wanted to let Lon do his part as far as being the Denver agent in charge. So I kind of backed out of the situation. Lon really didn't discuss too much except for he was talking directly about the case, giving the particulars, and talking to the sheriff of Eagle County.

Q Did you realize that you were an eyewitness to the incident that had formed the basis for Steve Howards being arrested?

A Yes, sir.

MR. WESTFALL: Objection to form, sorry, Westfall.

A Yes, sir.

Q (BY MR. LANE) Okay. I mean, you were right there – how close to this whole incident were you when it occurred?

[24] A Eight inches from the Vice President's shoulder. I mean, I was right next to him, sir.

Q Okay. So was there anybody who was in closer proximity than you other than the Vice President?

A No, sir.

Q Okay. Did you ever get interviewed by Lon Garner or Agent Reichle or any other agent in the Secret Service besides the boss about what happened?

A No. I spoke to Lon Garner about it because, again, you know, he was there, he was at the restaurant when we first got notified. So I described what happened with Lon. I never spoke to Mr. Reichle.

Q Okay. Did Garner ever tell you that Reichle described an incident that sounds completely different than the incident you've just described?

MR. GALLAGHER: Object to form, Gallagher.

THE DEPONENT: Yes.

Q (BY MR. LANE) Okay. What did Garner say about – how did that all happen? [25] Describe that whole conversation.

A I believe Lon used the words that Mr. Reichle had been given information that someone had shoved or laid hands on the Vice President. And that was why he placed Mr. Howards under arrest for assaulting the Vice President.

Q Okay. And what did you say when Garner told you that?

A I described to Lon what I saw, and that was it. Just like I described to you, sir.

Q Okay. And now at this point Steve Howards is in custody, right?

A I believe he – I believe he is.

Q Okay. And you have information that he's not guilty of any crime, right?

A Well, what I see and what someone else sees, looking at the same thing, it can be different.

Q Right. Did you find out that Reichle never actually even saw the incident?

A MALE VOICE: Please let the witness finish his answer.

MR. LANE: I'm sorry. I can't see – the witness sounded like he stopped.

A No problem.

[26] You know, two of us can look at the same thing from different angles and see something totally different. So I wasn't – you know, I wasn't going to question what someone else saw. I know what I saw, and that was my opinion, sir.

Q (BY MR. LANE) Right. But did Lon – I mean Lon Garner describe to you a complete shove or a strike –

A He didn't use those terms, no, sir.

Q – a hard slap? What terms did he use?

A It's been two years, sir.

Q No, I understand. I'm putting you on the spot, I understand, but this is very important.

A I understand. I understand, sir.

I want to say either "Someone laid hands on" or – not shoved, "Someone laid hands on the Vice President." And then I described to Lon what I saw. And I think – and that's it.

Q Okay. You know what you saw, right? I mean, there's no doubt in your mind that you saw what you saw as you've described it to me, right?

A Absolutely.

Q All right. And you told me you [27] didn't have probable cause to arrest Steve Howards at that point, right? Or you would have arrested him, right?

A I didn't feel that I did, no, sir.

Q Okay. But another agent who saw, apparently, the same incident that you saw – did Lon Garner describe that Reichle's description of the incident differed from yours?

MR. GILLIGAN: Object to the form, Gilligan.

Q (BY MR. LANE) Let me rephrase it. Did Garner tell you that, "Hey, Reichle told me this is what happened, X, Y, Z." And then you said, "Well, that's not what I saw." Did you ever have that conversation with Garner?

A Yes. I didn't say it exactly like that, but I did say, "This is what I observed at that time." So I gave Lon my account of what I saw, yes.

Q And did Garner then figuratively scratch his head and say, "Well, what the hell, what's going on here? How come we've got such two wildly different accounts of the same incident?"

MR. GILLIGAN: Objection to the form, Gilligan.

[28] A We really didn't – I mean, there really wasn't a lot of dialogue between Lon and I after that, to be honest with you. He was – I believe he went back to his room – oh, no, actually I think he may have driven out there to be with the agent. I'm not sure on that. I think he may have driven out there, though. So at that point we lost contact.

Q (BY MR. LANE) At any point did anyone ask you to fill out a report?

A No.

Q Did you ever reach out to anyone and say, "You know what, I don't think this guy is guilty of any crime, I don't know why this guy is in custody"? I'm sorry?

A I'm thinking here. I'm trying to think what I said. Was he in – he was in custody at the time.

Q Yeah. He was in custody for about four or five hours after the incident.

A Okay. And, you know, I don't – I don't perceive being in custody as being arrested. Maybe – and I'm not an attorney, sir.

Q Well, let's just put it this way. He was in handcuffs and in the Eagle County Jail [29] for four to five hours.

A Okay. All right. Because, again, if I am – and it's been a long time since I've been on the street, but if I'm working a case and I want to get further information, I'll bring somebody downtown and talk to them. I don't believe – you know, in my mind, you know – maybe I haven't arrested him yet.

Q He was in the Kobe Bryant memorial cell.

A Okay.

Q So did you ever reach out and say, "You know. what's going on, guys? I mean, this guy didn't do anything, I was right there, I saw it"?

A I told them my story, and at that point I let the Denver office handle it. It's a different – it happened in a different district, they have an agent in charge there who handles those things, who goes to the sheriff's office, who deals with the U.S. department, who deals with the administrative office.

Q And that was Lon Garner?

A That was Lon Garner.

Q And you told him what you saw, and that was the last of it as far as you knew?

[30] A Yes, sir.

Q When did you find out about this ongoing litigation?

A It was in June of '06 that it first occurred, right? Am I correct on that, sir?

Q Yes, that's right.

A It was sometime after that. I mean, it wasn't – it wasn't immediate. I mean, I would be guessing six months or later.

Q Okay.

A I would be guessing.

Q All right. And have you ever interviewed any of the defendants in this case, either Reichle, McLaughlin, Daniels, Doyle? Have you ever interviewed any of them?

A You mean since then?

Q I'm sorry?

A Since the incident?

Q Yes. Did you ever talk to any of them about this?

A After the incident – not that I recall, sir.

Q Okay. I believe there was a report, and I may be misremembering something, where somebody said that you said to Lon Garner that the [31] Vice President said there was no assault. Maybe I've got you confused with somebody else, but that's my memory,

that there's some report out there that you told Garner or you told someone that the Vice President said there was no assault.

A I never spoke to the Vice President about this incident.

Q Okay. Do you know if the Vice President spoke to anyone about this incident?

A I don't know that.

Q What was Steve Howards' tone of voice when he was speaking to the Vice President? I mean, was he screaming? Was he shouting? Was he just conversational? How did that go?

A A little more than conversational, but it wasn't – he wasn't yelling, no, sir. Just to be heard. It was not yelling.

Q Okay. Is it fair to say he never made any threatening gestures of any kind to the Vice President that you saw?

A In my opinion, there was no threatening gestures, no.

Q Okay. Are you testifying that you – that you didn't hear if the Vice President responded to Steve Howards or he did not respond to [32] Steve Howards or he did respond and you simply couldn't hear? What's your testimony regarding that?

A No, if the Vice President said something to Mr. Howards, I would have heard. I was that close.

I don't recall him responding to him at all. I do recall him looking up at Mr. Howards, but that was it.

Q Did the Vice President ever ask you or say one word to you about his encounter with Steve Howards on scene?

A Not a single word, sir.

Q Do you know whether he spoke to any other agents and instructed them to do anything about Steve Howards?

(Ms. Licht entered the room.)

A Sir, the Vice President, I've known him for over four years, and if there was any incident or concern, I would be the one he talked to.

Q So it's your testimony that the Vice President never told you, "Go get that guy," or you know, gave you any sort of your marching orders to put the wheels in spin to get Steve Howards arrested in retaliation for his comment?

[33] A Nothing at all. Nothing like that at all, sir, no.

Q When you were eight inches from the Vice President when Steve Howards was talking to him, how close was the next closest agent that you recall? And who was that person?

A I couldn't recall who the – I wouldn't know the name, but it would be somebody with Mrs. Cheney, probably a couple feet away.

Q Okay. Did there come a time when you found out that Reichle was the arresting agent?

A Yes, sir, when I was – after I had been told that he had been – to call the director, and then talking to Lon, found out that Reichle, who was the intelligence agent for that visit, had made the arrest.

Q Do you know if the Secret Service has investigated this incident?

A I don't know.

Q Do you know that Reichle is now stationed in Guam?

A Now that you said that, I believe I got that from "The New York Times" article. I believe it was in "The New York Times" article. That's how I found out.

* * *

EXHIBIT H – WURST DEPO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CIVIL ACTION NO.: 06-CV-01964-WYD-CBS

TELEPHONE DEPOSITION OF: ANDREW WURST
EXAMINATION DATE: June 30, 2008

STEVEN HOWARDS,

Plaintiff,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity; KRISTOPHER MISCHLONEY, in his individual and official capacity; DANIEL McLAUGHLIN, in his individual and official capacity; DAN DOYLE, in his individual and official capacity; and ADAM DANIELS, in his individual and official capacity;

Defendants.

PURSUANT TO NOTICE, the telephone deposition of ANDREW WURST was taken at 10:43 a.m. on June 30, 2008, at 1543 Champa Street, Suite 400, Denver, Colorado 80202, before Gail Obermeyer, Registered Professional Reporter and Notary Public in and for the State of Colorado, said deposition being taken pursuant to the Federal Rules of Civil Procedure.

Gail Obermeyer
Registered Professional Reporter

* * *

[10] of the vice president. And I looked down, and I saw Mr. Howards. I thought he was going to – people were milling around the vice president, going up shaking his hand, saying hello to him.

Q When you say you "looked down," were you elevated somehow?

A No, no, no. I was out in front.

Q Okay. So you looked back behind you?

A I was standing sideways, and I was looking down that way, looking down the walkway.

Q Okay.

A And I saw Mr. Howards walk up. I thought he was going to shake his hand. And he said something to the vice president, and with his other hand, he put it on the vice president's shoulder and made a push-off move.

Q What is a push-off move?

A It's hard to describe over the phone.

Q I understand, but do your best.

A He put his left hand on the vice president's right shoulder and pushed off

Q Okay. He pushed off. Now, tell [11] me what "pushed off" means.

A Oh, just what I said. He put his left hand on his shoulder, said something, and made a push-off,

straight-arm type of movement on his – on the vice president's shoulder.

Q Well, I mean, I've seen a running back in a football game give a stiff-arm, push-off to a defensive back trying to tackle him, and it knocks the guy over. Okay. I've also seen somebody touch somebody else on the shoulder. Okay. I don't know what you're talking about, so . . .

A Well, it didn't knock him over.

Q Did he even move?

A Well, yeah. I think he moved. And it certainly drew my attention. His demeanor and his behavior was something I haven't seen in my experience.

Q Well, what was his demeanor? You were 15 to 20 yards away, you said; is that right?

A Yes, sir.

Q Okay. So we're talking 45 to 60 feet away, right?

A It was about 15 yards away, yes. [12] sir.

Q Okay. What did you hear Steve Howards say to the vice president?

A I couldn't hear what he said, sir.

Q All right. Presumably, the vice president was facing you, and Steve Howards had his back to you during this encounter; is that correct?

A Full length sideways.

Q So both of them had their sides to you?

A Yeah, more like sideways, sir; yeah, yes.

Q Okay. Were you on the vice president's right side or on the vice president's left side?

A I was up the mall. And I think I would have been on the left side looking down. I was on the left side of the storefronts.

Q So you were looking at the vice president's left side; is that correct?

A Well, sir, I saw the vice president – I could see the vice president's full figure, full size.

[13] Q Were you – okay. The vice president is facing forward. Okay. Call that 12 o'clock. Where were you?

A I was at about 11 o'clock.

Q Okay. So you saw the vice president's front and Steve Howards' back, basically. Is that what you're saying?

A Well, I think – I saw Steve Howards' side.

Q Okay. What did Steve Howards say to the vice president?

A I couldn't hear him, sir.

Q Okay. Well, you talked about his demeanor. You thought he was going to go up and shake the vice president's hand, didn't you?

A Well, other people were shaking his hand. I thought he was going to go up and shake his hand. He said something. He moved up. He looked a little agitated and said something, but I couldn't determine – and then, you know, he made that move on his shoulder, but I couldn't determine what he said.

Q All right. You are assigned to protect the vice president; is that correct?

A Yes, sir.

[14] Q Okay. And if somebody had assaulted the vice president right in front of your face, you would have taken immediate action; is that correct?

A Yes, sir.

Q And you did not seek to restrain Steve Howards, grab him, or detain him right then and there, did you?

A Sir, I couldn't – I don't know that it would rise to the level of assault, but it certainly needed to be further investigated.

Q Well, did he simply put his hand on the vice president's shoulder?

A No, sir.

Q Well, describe the physical movements. Maybe it would be helpful to you if you demonstrated it on Mr. Gallagher, who's been our guinea pig throughout this case. Demonstrate it for him, and then as you're

doing the physical demonstration, describe for the record what it is you're doing.

MR. GALLAGHER: If you're viewing this by speakerphone, David?

MR. LANE: Yes.

A I'm standing in front of the [15] storefront, and people are coming up –

MR. LANE: You got to get closer to the speaker, though, so we can hear you.

A I'm standing in front of the storefront, and people are coming up to the vice president. And Mr. Howards went up, put his left hand on his right shoulder and said something, and then walked away.

Q (BY MR. LANE) Okay. So he placed his left hand on his right shoulder?

A And then walked – said something and then walked away.

Q So is it simply placing his left hand on the right shoulder of the vice president?

MR. GILLIGAN: David, maybe you better repeat the question.

Q (BY MR. LANE) Was it simply placing his left hand on the right shoulder of the vice president?

A No, sir. He put it on the front of his shoulder and walked away; pushed off a little and walked away.

Q Well, it didn't cause the vice president to step backwards, did it?

[16] A Not really. I mean, it made his shoulder move, but not really.

MR. GILLIGAN: David, can the witness sit down now?

MR. LANE: Sure.

Q (BY MR. LANE) And did you hear the vice president call out for help?

A No, sir.

Q Did the vice president visibly react in any way to this encounter?

A No, sir.

Q He continued on shaking hands with people?

A Well, at this point, I walked down to the special agent in charge.

Q Who was that?

A Mike Lee.

Q And what happened?

A I said, "Mike, do we need a protective intelligence team on this guy?" He said, "Yeah. Let's get a team. We'll check him out."

Q Okay. Now, Mike Lee was standing directly next to the vice president when this happened; isn't that correct?

[17] A I think Mike Lee was a couple feet behind the vice president, yes, sir.

Q Okay. If I told you that Mike Lee testified that he was 8 inches away from the vice president when this entire encounter occurred, you wouldn't dispute that fact, would you?

MR. WESTFALL: Objection, form. Westfall.

Q (BY MR. LANE) Go ahead and answer.

A You know, Mike Lee was in close proximity to the vice president.

Q Now, Mike Lee didn't call you over?

MR. GILLIGAN: David, please let the witness finish his answers before you ask your next question.

MR. LANE: Well, I would if I knew that he was continuing to speak. But I thought he was finished.

MR. GILLIGAN: On that occasion, he was not. Do you have something else you need to say?

A No. I thought Mike was about 2 feet away, sir.

[18] Q (BY MR. LANE) Okay. Mike Lee didn't call you over, did he?

A No, sir.

Q You took it upon yourself to go talk to Mike Lee; is that correct?

A Yes, sir.

Q Why did you do that?

A Because in my experience, I hadn't seen this, and I thought there was something may be wrong. I didn't know – again, I didn't hear what he said, so I wanted to see if Mike Lee thought that we needed a PI team on it.

Q So certainly at that point you did not believe that there was probable cause to believe that any crime had been committed in your presence against the vice president of the United States, did you?

MR. WESTFALL: Objection, form. Westfall.

MR. GALLAGHER: Same objection. Gallagher.

Q (BY MR. LANE) Answer the question.

MR. GILLIGAN: Answer.

A Well, I don't think it rose to [19] that level, but it definitely needed to be further investigated.

Q (BY MR. LANE) Okay. And you understand as a peace officer you can only arrest someone if you have probable cause to believe that they've committed a crime; isn't that correct?

A Yes, sir.

Q Okay. So Lee said, "Sure, go ahead and put a team on this guy," or words to that effect?

A Mike concurred and said, "Yeah, we'll check this guy out. We'll check him out."

Q Okay. So what did you do?

A Then I asked Oscar Rosales to – I said, "Oscar, let's see if we can get a PI team, check this guy out. I don't like the way he put his hands on the vice president."

Q So what happened then?

A Then we moved to the vehicles.

Q All right. And did you see Steve Howards or know anything about what happened to him later on down the road?

A Later on in the day.

Q Well, what did you see or hear?

[20] A I heard that Mr. Howards was arrested.

Q And did you hear what he was arrested for?

A No. I wasn't sure what he was arrested for.

Q Who did you hear this from?

A I think Mike Lee had called me. We went to his room, and we heard that he was arrested.

Q You and Lee were together when the word came down that Steve Howards had been arrested?

A No. Mike – I wasn't with Mike. It was around lunchtime; and I think, you know, Mike had called me to his room.

Q To do what?

A Well, he let me know that he was arrested.

Q Why was – I mean, what was your understanding of why Mike Lee needed to let you know that Steve Howards had been arrested?

A Well, we were just going to talk about what had happened, I guess.

Q Okay. And you didn't see Steve [21] Howards commit any crime, did you?

MR. GALLAGHER: Object to form. Gallagher.

MR. GILLIGAN: You may answer.

A Again, sir –

Q (BY MR. LANE) Just yes or no. You didn't see Steve Howards commit any crime. Yes or no?

MR. GILLIGAN: He'll answer it the way he feels best.

MR. LANE: Well, no. I'm asking him for a yes or a no. So he'll give me a yes or a no, if he can.

MR. GILLIGAN: Mr. Wurst will answer the question to the best of his ability.

MR. LANE: Right.

Q (BY MR. LANE) Yes or no, Agent Wurst, did you or did you not ever see Steve Howards commit any crime in your presence?

MR. GILLIGAN: Answer the way you feel you need to.

MR. GALLAGHER: Objection to form. Gallagher.

MR. WESTFALL: I'll join the objection. Westfall.

[22] Q (BY MR. LANE) Go ahead and answer the question, Agent Wurst.

A Again, sir, I don't know that it rose to the level of assault, but it definitely concerned me, and I thought that it needed to be further investigated.

Q My question to you is, did you ever see Steve Howards commit any crime in your presence, yes or no?

MR. WESTFALL: Same objection. Westfall.

MR. GALLAGHER: Objection to form. Gallagher.

MR. GILLIGAN: Answer the question the way you –

MR. LANE: I'm happy to call the magistrate on this if you guys are – if I can't get a yes or a no.

Q (BY MR. LANE) Did you see a crime committed by Steve Howards or did you not? It's a very simple question, Agent Wurst.

MR. WESTFALL: Same objection. Westfall.

A No. I don't think that was an assault at that time, sir, no.

[23] Q (BY MR. LANE) Okay. Did you see him commit any crime – be it assault, be it anything – that you knew of or know of today?

A No, sir.

Q Okay.

A I didn't see anything.

Q Okay. So when you and Mike Lee are together in Mike Lee's hotel room, why – what was your perception as to the reason Mike Lee needed to tell you that Steve Howards had been arrested?

A I think he just wanted to talk about the situation. I'm sure he was going to need to confer with headquarters, and he just needed to talk about the situation.

Q Well, did it surprise you that Steve Howards had been arrested?

A Well, I wasn't there, so I don't know – I mean, I didn't know – it didn't surprise me one way or another. I didn't think about it one way or another.

Q Well, didn't Mike Lee tell you, "Hey, that guy that you put the PI team on got arrested," or words to that effect?

A Yeah.

[24] Q And didn't you say, "Well, what did he get arrested for"?

A Well, we didn't know at the time.

Q So Mike Lee didn't know at the time, either?

A I think he was gathering the facts.

Q Okay. Were you with him when he finally found out why Steve Howards had been arrested?

A I don't know – I don't know. I don't remember that.

Q Okay. Well, when did you find out why Steve Howards had been arrested?

A Well, also at this time Agent McLaughlin came to Mike Lee's room and explained that he had helped arrest Mr. Howards.

Q Okay. And what did McLaughlin say as to the reason why he arrested Steve Howards?

A I think he just said he had helped Agent Reichle.

Q Did anybody make any inquiry, like, "What the hell is this guy being arrested for"?

[25] A I didn't make the inquiry, sir.

Q Well, did anybody in your presence ever say, "Why is Steve Howards being arrested"?

A I don't remember. I believe, but I'm not a hundred percent sure, I think he was arrested for assault on the vice president.

MR. LANE: I don't know what that meant, that dial tone we just got. I don't know if somebody hung up or not. But are you guys still there?

MR. GALLAGHER: We didn't hear a dial tone or anything from our side, David.

MR. LANE: Okay.

Q (BY MR. LANE) Well, at any time did you tell Agent Lee or anybody else that, "I never saw Steve Howards commit any crimes in my presence"?

A No. I just said what I saw, sir.

Q Okay. And what you said to all agents who you talked to about this is pretty much exactly what you told me today, right?

A Correct.

Q Were you asked to fill out any

* * *

EXHIBIT I – BOHRER DEPO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEVEN HOWARDS, Plaintiff, vs. VIRGIL D. "GUS" REICHLE JR., IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, ET ANO, Defendants.	Case No. 06-CV-01964-WYD-CBS

* THIS DOCUMENT PLACED
UNDER SEAL PENDING REVIEW *

Washington, D.C.

Friday, December 14, 2007

Video Deposition of:

DAVID BOHRER

called for oral examination by counsel for Defendants, pursuant to notice, at Hogan & Hartson, 555 13th Street, N.W., Washington, D.C., 20004, before Robert Michael Jakupciak, RPR, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at 2:30 p.m., when were present on behalf of the respective parties:

* * *

[10] there. It's an outdoor area, pretty open area.

And as they, as they were walking, the – the Vice President, the grandkids, walking with the usual Secret Service folks around them, along with people, you know, public, members of the public walking around also. Someone had started yelling about, a male individual started yelling about the Vice President's Iraq policy. I don't remember his exact words. I remember hearing Iraq policy and remember that it was negative in connotation.

The person came around, and came up and slapped the back of the Vice President in the upper shoulder area, and then, you know, went off to – then left the Vice President's very immediate vicinity.

Q Was that person later identified as Mr. Howards to you?

A To me, yes.

Q In the years that you've worked for the Vice President, how frequently does someone come up and slap the Vice President like that?

A I've never seen it.

[11] Q I would like you to demonstrate for us what you observed Mr. Howards doing, the nature of the slap on the Vice President. And I think in order to demonstrate that, we would like to ask Agent Doyle if he would be willing to stand next to you. And if you could demonstrate for us what you observed.

A Okay. If I were Mr – if I were the Plaintiff –

Q Right. Mr. Howards.

A And you were the Vice President – I'll have you just face this way. He came up first from around this side, walked into his vicinity here and kind of slapped him like that.

Q Okay. Thank you, sir. You can sit down.

Where were you standing at the time that Mr. Howards approached the Vice President?

A I was in front of the Vice President walking backwards facing the Vice President.

Q And why is it that you were walking backwards facing the Vice President?

A So I can see him. My job is all about [12] watching him and seeing what he does, when to take a picture. And so I was – so I walk backwards a lot.

Q Did you take any pictures that you think might have shown Mr. Howards in the crowd or approaching the Vice President?

A No. Not that I'm aware of.

Q Did you go back and look at the pictures you took that day to determine whether in fact you might have had a picture of this incident?

A Yes.

Q And what did you determine?

A I don't know what the individual looks like, but what I – there were no pictures from when they left the recreation area to when this incident happened until probably about four minutes after the incident happened. So we were a good distance away from where it happened when I started taking pictures.

Q And what did you start taking pictures of then?

A He and the grandkids together, some people that had come up and, to shake his hand, and then [13] the grandkids themselves with some local performers there.

Q So when is the first point in time that you observed Mr. Howards near the Vice President?

A Without – let's see. Without knowing who he was, I saw him come from – if I'm looking at the Vice President, I saw him, an individual come from the back from – from the Vice President's rear around to his left side, perpendicular with him. Then when he came up to slap him on the back, and then he moved off to the, off to the right. And that was really the last time I saw him.

Q Could you tell if the Vice President saw Mr. Howards approaching him before Mr. Howards slapped him on his back?

A No. Not that I recall.

Q Did it appear to you that it caught the Vice President by surprise?

A Yes.

Q How did the Vice President react, if you could, can tell?

A He was startled.

[14] Q Did you notice any movement of the Vice President's shoulder when Mr. Howards slapped him?

A The same that anybody would be when they're startled.

Q Once Mr. Howards moved away, did you continue to watch Mr. Howards?

A No.

Q Sometime later you were asked by the Secret Service to fill out a witness statement; is that correct?

A Yes.

MR. GALLAGHER: Sir, I have no further questions. We may have some questions from our counsel who are located in Denver today.

Richard and David?

MR. LANE: Richard, do you want to go ahead?

MR. WESTFALL: I have no questions.

BY MR. LANE:

Q Mr. Bohrer, my name is David Lane and I represent Steve Howards in this matter. I do have a few questions for you.

[15] Q Have you studied any documents in preparation for your testimony today?

A No.

Q Did you review the report that you wrote in anticipation of your testimony today?

A Yes.

Q All right. So that is a document that you did in fact review in preparation for your testimony today; is that correct?

A Correct.

Q All right. Did you review any other documents in preparation for your testimony today?

A No.

Q Do you know what the subject matter of this lawsuit is?

A Not clearly.

Q What do you believe it to be?

MR. LANE: Let me just interrupt for a second. Somebody keeps walking in front of the lens in D.C., interrupting the –

MR. GALLAGHER: Yeah. David, that was me. I'm anticipating that you might be going to mark [16] that witness statement as an exhibit, so I am grabbing it for you in anticipation.

MR. LANE: Okay. I appreciate it. I think it's already been previously marked as Exhibit 5. So if you could hand the witness Exhibit 5, that would be great, Sean. Thank you.

MR. GALLAGHER: It's going to take me a moment to find it here.

MR. LANE: It's Bates stamped Howards 17.

MR. GALLAGHER: Okay. Here you go, sir.

THE WITNESS: Thanks.

BY MR. LANE:

Q Is that your statement, Mr. Bohrer?

A Yes, it is.

Q Okay. What is it that you understand the nature of this lawsuit to be?

A I don't – I don't have any clear knowledge as to what this is. I'm sure Plaintiff is claiming that the Secret Service shouldn't have, shouldn't have approached him. That's all I'm aware of.

Q Do you know what happened to Mr. Howards?

[17] A No.

Q All right. Let me get into the incident with you then. Your job is, since May 5th, 2000, to document the daily life of the White House and in particular the Vice President; is that correct?

A May 5th, 2001.

Q 2001. Document daily life in the White House and in particular the Vice President?

A Correct.

Q And you indicated that in your direct testimony the usual group of Secret Service agents were following the Vice President on the day in question in June of 2006; is that correct?

A Correct.

Q Is it fair to say that you knew many of these agents?

A Some.

Q How many did you know?

A I couldn't – I could speculate. Four, five, six, seven. I really don't know. I don't know exactly how many were there.

Q Do you know – Mr. Doyle is seated in the [18] room with you right now; is that correct?

A Yes.

Q And did you see Mr. Doyle there on the day in question?

A I don't recall.

Q Are you familiar with Mr. Doyle?

A No.

Q Okay. Are you familiar with Agent Gus Reichle?

A No.

Q Are you familiar with Agents Daniel or McLaughlin?

A No. But I may know them by face. But I may not know their name. So I can't categorically say that I don't know them.

Q All right. Now, you indicated that what drew your attention to Steve Howards was that he was yelling about Iraq; is that correct?

A Iraq policy.

Q All right. Now, I would like you to review your report for one moment, Exhibit 5, and tell me if you agree that the words yelling are [19] nowhere in your report?

A It says said something to the VP about Iraq policy.

Q Okay. Do you agree that saying something to the VP and yelling something at the VP are two completely different things?

A Not necessarily.

Q Well, obviously, when you're yelling something you're also saying something, but when you're saying something you're not necessarily yelling something.

Do you agree with that?

A He yelled something.

Q Okay. Can you explain to me why you didn't write in your report that he yelled something?

A I'm not a lawyer.

Q I understand that, but you do speak and understand the English language; is that correct?

MR. GILLIGAN: Object to the form.

Q Is that correct?

MR. GILLIGAN: You may answer.

[20] A Yes.

Q All right. You had yelling in your repertoire of available words to you when you filled out this report; you chose not to put it in, didn't you?

A Apparently.

Q Okay. But you did note that he was walking at a quicker than normal pace, didn't you?

A Yes.

Q All right. Can you explain to me why that was significant to you?

A Because he stood out by walking at a quicker than normal pace.

Q And you would also agree that had he been yelling at the Vice President, he would have stood out because he was yelling also?

MR. GALLAGHER: I object to form. You can answer.

A As he did.

Q Right. My question to you is had he been yelling at the Vice President, that would have also been a reason for him to stand out; correct?

[21] A Yes.

Q Okay. As a photo journalist, you are there to document history; is that correct?

A Yes.

Q And you understand that a very unfortunate part of American history has included assaults and murders of high ranking government officials; is that correct?

A Yes.

Q And you also understand that part of your job may at some time, God forbid, include documenting harm to the Vice President of the United States; isn't that correct?

A Yes.

Q And in the back of your mind, when you're out in a public place like this I'm sure that is probably somewhere in your consciousness, is it not?

A Yes.

Q And, in fact, as the Vice President was walking in Beaver Creek immediately prior to being approached by Mr. Howards, you were facing him with your camera at the ready, were you not?

[22] A I was facing him with my camera, not necessarily at the ready. I didn't have it up to my face.

Q Well, it's difficult to walk backwards with a camera up to your face, isn't it?

A That's what I do all the time.

Q All right. But you were walking backwards in the event that a good photo op presented it itself; isn't that correct?

A Yes.

Q Okay. Steve Howards comes out of this crowd walking quickly, yelling at the Vice President; correct?

A Yes.

Q He slaps him on the back as you've demonstrated; is that correct?

A Yes.

Q You have been with the Vice President for over seven years now; is that correct?

A Yes.

Q In seven years you have never in your entire seven year history seen that happen; is that [23] correct?

A Correct.

Q You did not snap one single, solitary photograph of this incident, did you?

A Correct.

Q And you did not snap one single, solitary photograph because nothing of any consequence or significance had just occurred in your mind; is that correct?

MR. WESTFALL: Objection; form.

A No.

Q Answer the question.

A I did. That's not correct.

Q I'm sorry?

A That is not correct.

Q Why is it you did not snap a single photograph of this encounter, the likes of which in seven years you had never seen?

MR. WESTFALL: Objection; form.

A It happened quickly and I didn't, I didn't put the camera up to my face.

Q Okay. Well, we've already discussed how [24] part of your job, an important part of your job is recording historical events which may include the assassination of or the assault of the Vice President of the United States; right?

A Correct.

Q You're not suggesting that Mr. Howards committed some sort of a crime that you're aware of when he touched the Vice President, are you?

A I couldn't talk to that.

Q Well, I mean if he came up and punched him, you would know he just committed a crime, wouldn't you?

MR. WESTFALL: Objection; form.

A I wouldn't say.

Q Well, Mr. Bohrer, you're a citizen of the United States I trust; is that correct?

A I think you know that.

Q You have some inkling of the laws that common sense tells you exist in the United States; is that correct?

A Yes.

Q And if somebody walked up to the Vice [25] President and punched him, you would be safe in your knowledge that that person has just committed a crime against the Vice President; isn't that correct?

A Yes.

Q Okay. My question to you is when you observed what Steve Howards did, it never occurred to you that, oh, my goodness, a crime has just been committed, did it?

A I can't say that a crime was or was not committed.

Q Well, let me ask you, did it cross your mind at that moment? Did you think oh, my goodness, the Vice President of the United States of America has just been assaulted?

Did you think that?

A I was surprised at what happened.

Q I understand that. That was not my question. My question was not were you surprised what happened. My question was did it cross your mind that the Vice President of the United States of America has just been assaulted? Yes or no?

* * *

EXHIBIT J - DURKIN DEPO

Charles P Durkin III 12 7 07 txt.txt

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

STEVEN HOWARDS,	:	
Plaintiff,	:	
vs.	:	Case No.
VIRGIL D. "GUS" REICHLE JR., in his individual and official capacity, et ano.,	:	06-CV-01964-WYD-CBS
Defendants.	:	

Washington, D.C.

Friday, December 7, 2007

Videotaped Deposition of:

CHARLES P. DURKIN, III

called for oral examination by counsel for Plaintiff, pursuant to notice, at Hogan & Hartson, L.L.P., 555 13th Street, Northwest, Washington, D.C., before Shari R. Broussard, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at 11:01 a.m., when were present on behalf of the respective parties:

On behalf of Plaintiff:

DAVID LANE, ESQUIRE
1543 Champa Street, Suite 400
Denver, Colorado 80202
(303) 571-1000

On behalf of Defendants DOYLE, MISCHLONEY and REICHLE:

SEAN R. GALLAGHER, ESQUIRE
Hogan & Hartson, L.L.P.
One Tabor Center, Suite 1500
1200 Seventeenth Street
Denver, Colorado 80202
(303) 899-7300

On behalf of Defendants DANIELS and McLAUGHLIN:

RICHARD A. WESTFALL, ESQUIRE
Hale Friesen, L.L.P.
1430 Wynkoop Street, Suite 300
Denver, Colorado 80202
(720) 904-6022

On behalf of OFFICE OF THE VICE PRESIDENT and U.S. SECRET SERVICE:

JAMES J. GILLIGAN, ESQUIRE
U.S. Department of Justice Civil Division
20 Massachusetts Avenue, Northwest

* * *

[16] A I really – I don't have a good one – understanding of it.

Q What's your surmise? What – what do you believe the subject matter is? Do you know?

A Not really. I mean I understand – I mean basically – I – I really don't. I – I – I don't know much about the case.

Q Okay.

A I haven't read about it or –

Q Okay.

A – you know. I'm just sort of just here to do my part.

Q Answer questions?

A Yeah.

Q Okay. I – I understand.

Well, let me ask you on June 16th, 2006 [17] what did you see happen in Beaver Creek, Colorado with the Vice President of the United States and my client Steve Howards?

A On that day I was with the vice President obviously out there where he was at, AEI, out there.

Q Out there what?

A The American Enterprise Institute.

Q Okay.

A They had a forum there. So we were just on the plaza near – just right out there on what you'd call, I guess, OTR, you know, it wasn't scheduled.

Q What's an OTR?

A I guess off the record. You just sort of, you know, go down there – it wasn't in the official schedule for the day, so we were just walking on the plaza. And people were, you know, people – he was out there just sort of looking at the shops and stuff, walked around getting some fresh air and that's pretty much it. And then Mr. – certain people were out there and would stop [18] and were kind of waiting for him to come up to him and say hi and – which he was – which he did, and I – I believe took some pictures with some people. I remember him taking some, you know, photos with a couple of people. But it was a very relaxed atmosphere just outside.

Q Sure.

A And my recollection of Mr. Howard is just how he approached the Vice President. He – he came in sort of a – a determined fashion I would say.

Q Just elaborate on what you mean by "determined fashion."

A Well, as I was explaining about sort of being a relaxed setting out there where people would typically sort of wait for the Vice President to come to them if they wanted to say hi or something, he walked at a, you know, brisk pace, which was – directly up to him and, you know, just places his hand on the vice President's arm and shook his hand and made a statement regarding Iraq policy and departed.

[19] Q What did he say about Iraq policy?

A I don't recall the whole – I just – it was – it wasn't a favorable opinion of it, but it – but I don't – I don't recall the details.

Q What was the Vice President's response to all that?

A Well, my recollection is that it was very calm. He just shook his hand and said okay, and that's – that's his – sort of just kept on going.

Q He didn't yell "Seize that man," did he?

A No, sir.

Q Okay. He didn't make any noises about go get him, do anything to him?

A Not that I recall.

Q Okay. You would have recalled that had he done that, wouldn't you?

A I would – I would think so.

Q Okay. Has this ever happened while you were accompanying the Vice President in the past, somebody comes up and says something critical of him and then walks away?

A There's – definitely, you know, you've [20] seen protestors let's say, you know, driving by the cars, you know, and stuff, and people at events have yelled while he's speaking –

Q Uh-huh.

A – or something like that, but in my time there no one approached in that manner. That was the reason that I recall it. Otherwise – you know, after, you know, filling that out, I didn't really think much about it.

Q Uh-huh.

A You know, I was just a witness, here it is. But it was unique in that – in sort of his approach to the Vice President.

Q Okay. I mean he – he didn't scream at the vice President, did he?

A No, sir.

Q He had a polite tone to him?

A You know, I was nearby, but – I could hear his comments, but I – I can't recall that – I would say it would be a – I guess it's hard to paraphrase the tone, but, you know, he was – he wanted to make a statement, he was –

[21] Q Uh-huh.

A – made the statement. It wasn't – he did not yell, no, you know.

Q Okay. I mean and then he walked away, right?

A Yes, sir.

Q Did you attach any significance to what had just happened?

A Yeah, I thought it – well, it was – it was – I thought it was unsettling just how – that he come up. It was unique. It was never – in my time I felt, you know, it just hadn't happened like that before.

Q When you say it was unsettling, tell me if I'm wrong, but were you – was your mind kind of thinking along the lines of geez, you know, this guy could have been anyone with a weapon or done

* * *

EXHIBIT K – DANIELS DEPO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEVEN HOWARDS, Plaintiff, v VIRGIL D. "GUS" REICHLE, JR., KRISTOPHER MISCHLONEY, DANIEL MCLAUGHLIN, DAN DOYLE, ADAM DANIELS, Individually and in Their Official Capacity. Defendants.	CASE NO 06-CV-01964-WYD-CBS

CONFIDENTIAL

Washington, D.C.

Tuesday, November 27, 2007

Deposition of:

ADAM DANIELS

called for oral examination by counsel for Plaintiff, pursuant to Notice, at the Law Offices of Hogan & Hartson, 555 13th Street, Northwest, 12th Floor, Washington, D.C., before Mary E. Warner of Capital Reporting, sworn by a Notary Public in and for the District of Columbia, beginning at 10:07 a.m.

* * *

[46] Q At that point, did you have probable cause to believe that Steve Howards had committed any offense?

A All I can say is that I observed the physical touching, the physical slap on the – on the – on the right shoulder, and the – and the physical reaction by the Vice President.

Q Uh-huh.

A And that something was said.

Q Right.

A I do not know what was said.

Q Right. But that wasn't the question I asked you. The question I asked you is, at that moment did you have probable cause to believe that Steve Howards had committed any offense?

A At that time?

Q Yes.

A From what I observed?

Q Yes.

A Prob – in my discretion as a law enforcement officer, I believe that probable cause had not yet been established. Probable cause [47] takes the totality of the circumstances to establish.

Q Right. And the totality of the circumstances that you had just observed, did you have probable cause to believe that any crime had been committed?

A From what I observed at that point –

Q Yes.

A – when Mr. Howards walked away, I personally did not have probable cause.

Q Okay. Therefore, had you arrested him based on what you saw, that would have been in violation of the Fourth Amendment to the United States Constitution, would it not?

MR. WESTFALL: Objection, form.

MR. GALLAGHER: Same objection.

THE WITNESS: Do you mean at the point that Mr. Howards made the physical contact with the Vice President and began walking away?

BY MR. LANE:

Q Yeah.

A And that's all I have?

[48] Q Yeah.

A And that's all I can observe?

Q Yep.

A Then that's – that's true. Probable cause did not exist to make an arrest.

Q Okay. So Agent Reichle ultimately motivated this arrest, is that correct? In other words, he's the guy that slapped the cuffs on with the help of Mr. McLaughlin? You heard McLaughlin's testimony about that, right?

A I heard Agent McLaughlin's testimony, yes.

Q Okay. Would you agree, then that – well, who was it that gave the thumbs up to do the arrest? Was it Agent Reichle?

MR. GALLAGHER: Object to the form.

THE WITNESS: Do you mean who made the decision to arrest?

BY MR. LANE:

Q Yes. Who made the decision to arrest?

A Agent Reichle made the decision to arrest.

[49] Q Okay. So presumably what you're telling me is pretty much the same thing that Mr. McLaughlin said, which is Agent Reichle had to have something more than what you have in order to have probable cause to make this arrest, right?

MR. GALLAGHER: Object to form.

BY MR. LANE:

Q Because if all he has is what you saw, that wasn't probable cause in your mind, was it?

MR. WESTFALL: Objection, form.

THE WITNESS: Sir, I don't know what Agent – information Agent Reichle had –

BY MR. LANE:

Q Uh-huh.

A – at the time that this incident occurred.

Q Right.

A Or at the time that Mr. Howards made the – made the approach to the Vice President to the time that he was taken into custody. I have no idea –

Q I understand.

* * *

[82] and we should monitor him until the PI team can come out to interview him.

Q Okay. And when McLaughlin says he's a person of interest, do you know where he got that information from?

A I'm sorry, sir. Can I go back?

Q Sure.

A He did not say those words. He did not say "person of interest." He just said, "Hey, we've got to follow that guy."

Q Okay. So that's like police officers never get out of their car, they exit their vehicles, is that it?

A Sure.

Q All right. So "we've got to follow this guy." And based on what you saw you agreed with that, didn't you?

A Yes.

Q Okay. And so what happened then?

A We followed him.

Q All right. Did – did the Vice President, to your knowledge, ever ask [83] anybody for help? Did he ever say anything at all to anyone about his interaction with Steve Howards?

A I don't know, sir.

Q Okay. All right. So you're following him. What's he doing?

A He's walking with his – what I assume is his family.

Q Okay. And for how long did – did you follow him?

A I can't give you an exact time, sir, but I would approximate – approximately ten minutes.

Q Okay. What happened then?

A We continued following him.

Q Well, at some point you stopped following him, so what happened?

A Again, at the – at the – I could be wrong on the time sir, but a certain time later, Agent Reichle

appeared on the scene and identified himself as Secret Service agent to Mr. Howards and asked if he could talk – politely asked if he could talk to him.

[84] Q Okay. And what happened then?

A Mr. Howards said something to the effect of "F off, or go F yourself, I'm not talking to you," and, again, walking away.

Q You know, that's not anywhere in your report, is it?

A I – I don't think it's in my report, sir, no.

Q Okay. So – so – and it's not in Agent McLaughlin's report either, did you know that?

A I did not read Mr. – Agent McLaughlin's report, so I can't testify as to what is in the report or not in the report.

Q Okay. Well, don't you think that that would be an important fact that if somebody told a Secret Service agent to go fuck themselves or fuck off, that would be in a report somewhere?

A Again, this is just my statement, sir. I'm just putting down the facts that I saw appropriate at the time.

Q I understand, but you didn't put those [85] facts in the report, did you?

A No, I did not.

Q Okay. And you've been schooled just like McLaughlin is schooled by the – in your entire law enforcement career as to how important reports are, aren't you?

A Reports are important, yes.

Q Okay. To – to record details that may be significant down the road, correct?

A Correct.

Q All right. And nowhere in your report do you ever indicate that Steve Howards told anybody to go fuck themselves, do you?

A No, that's not in my report, no.

Q You do write in your report that Reichle made a general question as to you and – or as to Doyle and McLaughlin and you, if the subject had touched Vice President Cheney. At this time you told him, "Yes, I saw it." You wrote that down, didn't you?

A Yes, I did.

Q Okay. And you note that the subject [86] pulled away from Reichle, didn't you?

A Yes, he did.

Q Is there some reason you didn't write in the – in the report that he never said, "Go fuck yourself' or "Fuck you" or anything of that nature?

A Are you asking me is there a reason I didn't put that in there?

Q Yeah.

A When I wrote that statement, sir – I was ordered to write that statement.

Q Who ordered you to?

A The supervisors of the Vice Presidential detail.

Q Okay.

A And I believe reports should be – include facts, but not all of the facts. And I included the facts in the report that I thought were most important. I did not include all of the facts. I didn't include the weather. I didn't include, you know, the shoes he was wearing. I included only the – the most important facts and [87] I left some things out. And that's one of the things that I left out.

Q Well, if Reichle were to testify here later today that the subject matter of the assault was this touching of the Vice President that you saw, then you would understand that any and all information that you have about that touching would be deemed important, wouldn't it?

MR. WESTFALL: Objection, form.

THE WITNESS: Are you asking me if Agent Reichle – that the touch that I saw between Mr. Howards and the Vice President, if –

BY MR. LANE:

Q That was the assault that he was being arrested for, okay?

MR. WESTFALL: Same.

BY MR. LANE:

Q Did you come to – to have an understanding at some point that that is, in fact, what he was being arrested for?

A Yes.

Q When did you come to that understanding?

[88] A Once Mr. – once Agent Reichle made the decision to arrest.

Q Okay. So you knew when you filled out this report that the – the touching, the detail about the touching was going to be very important to your report, didn't you?

A Yes.

Q All right.

A Yes.

Q Okay. And you've testified here today that it was a forceful touching, didn't you?

A I don't think I used the word "forceful."

Q Well, I think you used the term "slapped him," slapped him as – as your descriptive term?

A I said there was some force to it.

Q Okay. That's not in your report either, is it?

A Can I refer to my report, please.

Q Absolutely.

A Thank you.

Q I think it's Exhibit 7.

A Sure.

[89] Q And specifically look at Bates-stamped page 25, the lower right-hand corner.

A Okay.

Q All right. About a third of the way down, "At this time the subject" –

A I have bad handwriting. "White male, green T-shirt."

Q "White male, green T-shirt approached Vice President Cheney and placed his left hand on Vice President Cheney's right shoulder."

A Yes, sir.

Q You didn't say "slapped," did you?

A In my report, I didn't, no. You're right. I said "placed."

Q And you didn't note that there was any particular force involved in the placing of his hand, did you?

A I did not write that, no.

Q Okay. Because it wasn't important, was it?

A No, it's important.

Q Well, you didn't write it, did you?

* * *

[114] Deposition of ADAM DANIELS was reopened.)

* * * * * *

THE VIDEOGRAPHER: The time is 4:09 p.m. We're back on the record.

BY MR. LANE:

Q Agent Daniels, you're still under oath from your prior testimony.

You've sat through all of this, correct?

A Yes, sir.

Q Did you see Agent Doyle demo what Agent Reichle showed us Agent Doyle demoed on scene?

A No.

Q Have you had occasion to discuss with Agent Doyle what he saw?

A No.

Q Have you been a party to any conversation with Agent Reichle or anyone else about the security detail agents being involved in a cover up?

A No.

Q When was the first time you ever heard [115] about with the dispute that has now just been raised between Agent McLaughlin and Agent Reichle?

A Today.

Q This is the very first you've ever heard of any of this stuff, is that right?

A Which – which conflict are you talking about?

Q Well, let me paraphrase. Okay? Do you agree with the characterization that Agent Reichle is saying in essence that the security detail was involved in a cover up?

A Are you asking if I believe he thinks that or –

Q Yeah.

A I can't say whether or not he believes something.

Q Well, he just testified to that, right?

A I can say that's what I heard Agent Reichle say.

Q Okay. Fair enough. And you heard Agent McLaughlin say that Reichle has in essence asked McLaughlin to change his testimony, to change his [116] report, right?

A Yes.

Q Okay. Is this the first you've heard of any of those things? In other words, has McLaughlin ever

said to you, "I can't believe Reichle, he wants me to change my report"?

A We were at dinner when that phone call occurred, Dan McLaughlin and I.

Q On June 16th –

A Yes, sir.

Q – 2006?

A Yes, sir. And once Mr. – once Agent McLaughlin hung up the phone, the conversation was. "I can't believe he just asked me to do that."

Q What did you say?

A I agreed.

Q I mean, did he get into details as to what Reichle said about why he wanted him to do this?

A No.

Q Is that unethical?

[117] A What – is what unethical?

Q One law enforcement agent asking another one to change a report in material ways?

MR. WESTFALL: Objection to form.

MR. GALLAGHER: Same objection.

THE WITNESS: Well, I didn't – I was not a part – I was not a participant in that conversation so I don't know exactly what words were used.

BY MR. LANE:

Q Well, did Agent McLaughlin tell you what parts of the report he wanted changed?

A No.

Q In other words, there are very minor details that could be changed and then there are major details that could be changed, right?

A Sure.

Q But Reichle had indicated to McLaughlin apparently according to Mr. McLaughlin that, "Our reports disagree in terms of generally as to what happened"?

MR. WESTFALL: I object to the form.

* * *

EXHIBIT L – WINTERS DEPO

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
CIVIL ACTION NO. 06-CV-01964-WYD-CBS

VIDEOTAPED DEPOSITION OF: DOUG WINTERS EXAMINATION DATE: February 25, 2008

STEVEN HOWARDS,

Plaintiff,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity; KRISTOPHER MISCHLONEY, in his individual and official capacity; DANIEL McLAUGHLIN, in his individual and official capacity; DAN DOYLE, in his individual and official capacity; and ADAM DANIELS, in his individual and official capacity,

Defendants.

PURSUANT TO NOTICE, the videotaped deposition of DOUG WINTERS was taken at 1:09 p.m. on February 25, 2008, at 500 Broadway, Eagle, Colorado, before Lisa Persichitte Reed, Certified Realtime Reporter and Notary Public in and for the State of Colorado, said deposition being taken pursuant to the Federal Rules of Civil Procedure.

* * *

[18] A Okay. Okay. Could you ask me the question again?

Q What were the words that Reichle used, to the best of your memory, the exact words Reichle used in describing what Doyle had told him happened to the Vice President?

A It's – I don't – and my report doesn't reflect as far as exactly what Agent Reichle said that Doyle told him. I just have a general statement from Agent Reichle.

Q Read what you generally said in your report. Read that out loud for the court reporter, please.

A I was advised by SA Reichle that Howards had been arrested for assaulting – for assaulting Vice President Cheney. I was advised by SA Reichle that Howards was being verbally combative towards the agents.

Then it proceeds to – I state that I escorted him to Agent Reichle's vehicle. And then it states during the course of a pat-down, that I overheard all the Secret Service agents talking about the arrest, the assault that took place on the Vice President. And then we transported Mr. Howards to the jail and then I [19] spoke with Agent Doyle.

Q Okay, So Reichle told you that an assault had occurred on the Vice President; is that correct?

A Yes.

Q All right. Did you find out details of what that assault consisted of?

A Yes.

Q What did you find out and from whom did you find it out?

A What I just told you and in interviewing Agent Doyle.

Q What did Doyle tell you had happened?

A Exactly what I just told you, that he heard the phone conversation, watched the person go towards the Vice President, and then strike the Vice President on the shoulder.

Q Okay. Did anybody ever demonstrate for you how this strike looked?

A I don't remember.

Q Okay. Did you believe at that moment that the Vice President of the United States had just been assaulted?

A Can you define to – what does [20] assaulted mean to you because –

Q Well, you are a trained law enforcement officer, aren't you?

A Yes, I am.

Q All right. You've gone through POST certification; is that correct?

A Yes.

Q You've been through the academy?

A Yes.

Q You've been a deputy sheriff and a detective for 11 years?

A Yes.

Q Are you familiar with the Colorado Revised Statutes?

A Yes.

Q Are you familiar with assault in the third degree?

A Yes.

Q What are the elements of assault in the third degree as you recall them? And this is not a pop quiz. I'm not going to hold you to it because you probably don't have your book there, but just generically and generally, what do you think assault in the third degree is?

A With intent or knowingly to [21] assault a person causing bodily injury.

Q Okay. And assault in the third degree is a misdemeanor, right?

A Yes.

Q And you understand all it has to have is a little bit of pain maybe. You don't have to leave any marks, right?

MR. GALLAGHER: Object to the form. You can answer.

A Yeah, a claim of pain, that's correct.

Q (BY MR. LANE) All right. Did you believe that this was an assault in the third degree?

A No.

Q What did you believe it was?

A Harassment.

Q Why did you believe it was harassment?

A Because under harassment, it's shoves, strikes, or kicks as one of the elements.

Q Okay. Is this a state charge of harassment or a muni charge of harassment that you thought it was?

A A state charge.

[22] Q Okay. Harassment, you would agree, is less serious than assault in the third degree?

A Yes.

Q Okay. Now, you were not an eyewitness to the incident, correct?

A That's correct.

Q So did you ultimately file the harassment charges?

A Yes.

Q But you also knew that Reichle had claimed an assault had occurred, correct?

A Yes.

Q Now, assault could be anything from almost an attempted murder all the way down to, you know, causing a little bit of pain, right? Under the law, you've got assault in the first degree with a deadly weapon causing serious bodily injury. You are familiar with the different degrees of assault?

A I am, yes.

Q Okay. At some point, obviously, somebody must have explained to you what this was all about, so that caused you to decide "I'm going to only file harassment charges as opposed [23] to first degree assault charges," right?

A Well, yeah. I mean, I'm only bound by what elements I can prove.

Q Right. But you were not an eyewitness, so you were relying on others to fill in for you what the proof was going to be; isn't that correct?

A Yes, I relied on what's called the Fellow Officer Rule.

Q Okay. I'm very well acquainted with the Fellow Officer Rule. So what fellow officers did you talk to about what had actually occurred?

A The Secret Service agents involved.

Q And were those the named agents that you had already talked about?

A Yes, some of them.

Q Okay. Now, did you understand that this so-called assault had occurred directly in the presence of a number of Secret Service agents?

A At which time?

Q There was only one assault on the Vice President that you are aware of; isn't that [24] correct?

A That's correct, but there were specific, I guess, details throughout. So I'm just – I mean –

Q The question to you is, you understood that this so-called assault occurred in the direct presence of a number of agents; isn't that correct?

A I later found out that's correct.

Q Well, you later found out. Before you filed charges, you found out, right?

A Yes, oh, absolutely.

Q Okay. And did you come to find out that Reichle was not an eyewitness to the incident?

A Yes.

Q But you did find out that McLaughlin and Daniels were eyewitnesses to the incident; isn't that correct?

A Yes.

Q And you also found out that Doyle was an eyewitness to the incident; isn't that correct?

A Yes.

Q All right. Did you get the [25] particulars of what happened from any of those agents?

A Yes.

Q From all three of those agents?

A Yes.

Q Did they all three tell a consistent story to you about what they observed?

A For the most part, yes.

Q Okay. What did they – did they demonstrate for you what they saw occur?

A I don't remember.

Q What is it that they told you had occurred to the best of your recollection? And just pick one of those three. Pick Doyle, McLaughlin, or Daniels, and tell me what you recall that particular agent saying to you.

A Well, Doyle, I've already explained to you what was reflected to me. And then –

Q Go back to Doyle. I'm sorry to be difficult here, but what is it that Doyle told you?

A That he had overheard a male party on his cell phone –

Q Right, but get to the point where

* * *

[42] violated; isn't that correct?

A Yes.

Q That's why you were investigating; isn't that correct?

A Yes.

Q And are you telling me that officials from the United States Secret Service impeded you in your ability to effectively investigate this case?

MR. GILLIGAN: Object to the form.

A No.

MR. LANE: Let me just stop right now. Who objected to the form?

MR. GILLIGAN: Mr. Gilligan.

MR. LANE: Mr. Gilligan, I would ask you if you would please put on the record why – what was objectionable about the form of that question.

MR. GILLIGAN: I do not believe it correctly characterized the testimony of the witness.

MR. LANE: The witness hasn't answered the question yet, so there hasn't been any testimony yet.

[43] MR. GILLIGAN: And it assumes facts not in evidence, David. Take your pick.

MR. LANE: Well, I'm allowed to ask questions. I think it's simply obstructive to make a specious objection like that.

MR. GALLAGHER: It wasn't specious. And that was my second objection in a 45-minute deposition. I don't believe I've been obstructive.

MR. LANE: Okay.

Q (BY MR. LANE) Detective, I'm going to ask it again. Are you saying that agents of the United States Secret Service obstructed you in your ability to investigate criminal activity that you were charged with investigating?

MR. GILLIGAN: Same objection.

A No.

Q (BY MR. LANE) All right. You wanted to talk to the Vice President, didn't you?

A Yes.

Q All right. Why did you not talk to the Vice President?

A I was told he was not going to make a statement to us.

[44] Q Well, you said this occurred on day 2 out of a four-day protective detail; is that right?

A Yes.

Q Did you see the Vice President after the fact?

A Yes. Well, I mean, after the incident?

Q Yes.

A Yes.

Q Did you attempt to walk up to the Vice President and say, "I am a law enforcement officer and I want to investigate this incident that occurred with you where I made an arrest that you had been harassed"? Did you do that?

A No.

Q Did you try to do that?

A No.

Q Why did you not try to do that?

A I was already told at that point he was not going to make a statement.

Q And that's what I'm trying to figure out. Who told you that?

A I don't remember.

Q Okay. Well, who was the named [45] victim of the assault or the harassment that Steve Howards had allegedly perpetrated?

A The Vice President, Mr. Cheney.

Q In your entire 11 years in law enforcement, have you ever filed charges without talking to the victim of the crime?

A Let me think about that. I don't recall off the top of my head, no.

Q Okay. And, in fact, it's basic elementary investigative training that says you talk to the victim and get a report from the victim in order to thoroughly and accurately investigate a case; isn't that correct?

A You try to obtain a statement from the victim, that's correct. But we also have independent eyewitnesses here too.

Q Well, and there is somebody out there who said, in the Secret Service, there was no assault also, right?

A I don't know if it was in the Secret Service or not.

Q Okay. Well, I thought your prior testimony a few minutes ago was it was a Secret Service agent that may or may not have been an eyewitness that said there was no assault?

[46] A I said it could have been. I wasn't for sure.

Q Do you feel that you have an obligation if you have a belief that no crime was committed and you've

made an arrest to make sure that the person that has been falsely charged is exonerated?

A I'm sorry. Could you repeat that?

Q Yes. Do you believe that you have an obligation to ensure that if someone is not guilty of a crime that you have filed charges against them on, that you take steps to see that they are exonerated?

A Yes. If I receive that information, that's correct.

Q So what steps did you take to find out whether or not an assault had or had not been committed after you heard someone say there was no assault?

A I did not take any steps because I have an eyewitness from a fellow law enforcement officer that observed what they observed. And under Colorado rules, to me, that's probable cause. And what a fellow [47] officer's observation was was probable cause for an arrest.

Q Okay. What did Doyle (sic) or McLaughlin tell you had occurred – excuse me, Daniels or McLaughlin. What did Daniels or McLaughlin tell you had occurred?

A Based off of their reports, they had stated – may I refer to the reports specifically so I'm accurate?

Q If you need to to refresh your recollection, you can.

A Both Daniels and McLaughlin state that the subject placed his left hand on the Vice President's right shoulder.

Q All right. Which we've already decided is not necessarily illegal, correct?

A Correct.

Q All right. And this apparently happened right in front of them, right? They were eyewitnesses to this incident?

A Yes, that's correct.

Q At any time, did you ask any of the eyewitnesses "Why didn't you guys make an arrest here?"

A No.

[48] Q Why not?

A I don't know.

Q You heard Reichle say that an assault had occurred on the Vice President and that is why Steve Howards was arrested, correct?

A Yes.

Q And I can't remember if I asked you this or not. I'm not trying to trick you, but did Doyle demonstrate in your presence what he saw happened?

A I don't remember.

Q Why the necessity to file state charges if they were arresting him for a federal crime of assaulting the Vice President?

A Agent Reichle had consulted his assistant U.S. Attorney and they had asked if we could hold – or charge – or hold Mr. Howards on a state charge.

Q Well, do you know what the bond would be on a state charge of harassment?

A I don't – right off the top of my head, no.

Q But you knew that it was not likely to be a very high bond assuming the guy had no record, right?

[49] A Well, it's set according to the bond schedule, and I don't know what the bond schedule is.

Q But you know that the lower the level of the crime, the lower the bond is according to the schedule, right?

A That's correct.

Q And you know that harassment is a very low level misdemeanor, right?

A Yes.

Q And so you figure the bond is certainly not going to be very high if he doesn't have warrants or a bad record, right?

A Correct.

Q Okay. So you figured he likely will be able to make whatever bond you guys set on him for these charges, right?

A I don't know that.

Q Well, I mean, the lower the bond, the more likely it is somebody is going to make it. You would agree with that, right?

A No. There are some people in on a $500 bond that can't even make a bond and get out.

Q Exactly. But there are far fewer

* * *

EXHIBIT M – HEARING TRANSCRIPT 10/21/08

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Case No. 06-cv-01964-WYD-CBS

STEVEN HOWARDS,
Plaintiff,
vs.
VIRGIL D. "GUS" REICHLE, JR., et al.,
Defendants.

Proceedings before CRAIG B. SHAFFER, United States Magistrate Judge, United States District Court for the District of Colorado, commencing at 1:32 p.m., October 21, 2008, in the United States Courthouse, Denver, Colorado.

WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED . . .

APPEARANCES

DAVID LANE, Attorney at Law, appearing for the plaintiff.

SEAN GALLAGHER, DUGAN BLISS, RICHARD WESTFALL, AARON SOLOMON, and JAMES GILLIGAN, Attorneys

---

MOTION HEARING

* * *

[34] And depending upon whether or not somebody files a motion for summary judgment, that may very well find us in that very situation.

So I guess what I would be doing if I were a defense attorney or if I were a plaintiff's attorney, I'd be saying to myself, What are the odds that this case is going to be resolved on motion? If the odds that this case is going to be resolved on motion are not better, substantially better in my view than 50/50, I probably wouldn't spin my wheels filing a motion for summary judgment. I'd accept the reality that at the end of the day this is a dispute that will have to be resolved in a court of law in front of a jury. And I would say slowing that process doesn't – is not going to make the final outcome any more or less painful.

So if it were me, I probably wouldn't file a summary judgment motion, I would say we'll just accept the reality that we have to try this case and we'll do it.

MR. LANE: Judge, it would be my request that this Court set a date for dispositive motions with the understanding that if somehow more testimony is taken, they have leave to supplement, amend, renew their motions for summary judgment.

THE COURT: Well, I'm – and that's not an unreasonable request, Mr. Lane, but I – these – this is

* * *

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

STEVEN HOWARDS, Plaintiff, v VIRGIL D. "GUS" REICHLE, JR., KRISTOPHER MISCHLONEY, DANIEL MCLAUGHLIN, DAN DOYLE, ADAM DANIELS, Individually and in Their Official Capacity. Defendants.	CASE NO: 06-CV-01964-WYD-CBS

* * * CONFIDENTIAL * * *

Washington, D.C.

Tuesday, November 27, 2007

Deposition of:

VIRGIL REICHLE, JR.

called for oral examination by counsel for Plaintiff, pursuant to Notice, at the Law Offices of Hogan & Hartson, 555 13th Street, Northwest, 12th Floor, Washington, D.C., before Mary E. Warner of Capital Reporting, sworn by a Notary Public in and for the District of Columbia, beginning at 1:01 p.m.

* * *

[122] A He's a Secret Service spokesperson back in headquarters.

Q All right. And Zaren said, "Howards wasn't acting like the other folks in the area." Do you see that quote, the second paragraph and the third paragraph, "his behavior and demeanor wasn't quite right."

A I see that.

Q And it says, "The agents tried to question him and he was argumentative and combative." Do you see that?

A Yes, I see that.

Q Okay. Do you have any idea why it was there was never any mention of why he assaulted the Vice President?

A No.

MR. GALLAGHER: Objection to form.

BY MR. LANE:

Q Did you talk to Mr. Zaren about anything before this article was written?

A No.

Q Do you know where Mr. Zaren got his [123] information from?

A No.

Q Okay. And that's basically all these articles are pretty much the same. Look at page 57 of the Bates-stamped documents, which is still part of Exhibit 19. It's the last page on the exhibit. Is this a Secret Service release or is this an Eagle County Sheriff release?

A I don't know.

Q All right. Let's look at Exhibit 20. Did you do this legal research?

A Yes, I always keep a CRS book in my car.

Q Okay. What made you believe that Steve Howards intended to harass, annoy or alarm Vice President Cheney?

A It was precipitated by a telephone conversation that Special Agent Doyle had heard.

Q Okay. But – let me ask you this: Is it your – this may get a little technical, so follow me here. Okay. Harassment is what we're dealing with.

Is it the striking or the shoving or the [124] touching that has to be done with the intent to annoy, harass or alarm or is it simply the verbal communication coupled with the touching? In other words, let me – let me try to –

A It might –

MR. GALLAGHER: Hold on. Let's –let him finish asking the question.

MR. LANE: Well –

MR. GALLAGHER: I'd like to interpose an objection. And then you can try to answer.

BY MR. LANE:

Q In other words, if I go up to you without – let's say you're the Vice President or I go up to the Vice President and I just get in his face and say, "Your policies are disgusting. I think you're the worst Vice President in the history of the world," blah, blah, blah, blah, but I never lay a finger on him, okay? Have I committed a crime in your estimation?

A No, that's free speech.

Q Okay. Okay. But if I lay a finger on him, is it the touching of him that I have to – I [125] have to touch him and my intent in touching him is to annoy, alarm or harass him through the touch, is that what in your mind makes it a crime?

MR. GALLAGHER: Object to the form of the question but you can answer.

THE WITNESS: Yes, that's an element, a requirement. In my opinion, it's a combination of the two.

BY MR. LANE:

Q I guess what I'm saying is – well, I'll just leave it at that. And that's the subsection that you were dealing with sub 1, sub A, strike, shove or

otherwise touches a person or subjects him to physical contact?

A Correct.

Q Okay. And then you looked – you have this other research on page 60 here, is that right, which is pretty much the same thing? Does this come from a different book of some sort, I presume?

A Yes, I believe I downloaded this from the Internet.

* * *

[Certificate Of Notary Public Omitted In Printing]

PETITIONER'S BRIEF

No. 11-262

In The
Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR.,
DAN DOYLE,

Petitioners,

v.

STEVEN HOWARDS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Petitioners, two Secret Service agents on protective detail, arrested respondent following an encounter with Vice President Richard Cheney. Petitioners had probable cause to arrest respondent, who, in violation of 18 U.S.C. § 1001, falsely denied making unsolicited physical contact with the Vice President. Respondent thereafter brought a First Amendment retaliatory arrest claim against petitioners.

The questions presented are:

1. Whether, as the Tenth Circuit siding with the Ninth Circuit held here, the existence of probable cause to make an arrest does not bar a First Amendment retaliatory arrest claim; or whether, as the Second, Sixth, Eighth, and Eleventh Circuits have held, probable cause bars such a claim, including under *Hartman v. Moore*, 547 U.S. 250 (2006).

2. Whether the Tenth Circuit erred by denying qualified and absolute immunity to petitioners where probable cause existed for respondent's arrest, the arrest comported with the Fourth Amendment, it was not (and is not) clearly established that *Hartman* does not apply to First Amendment retaliatory arrest claims, and the denial of immunity threatens to interfere with the split-second, life-or-death decisions of Secret Service agents protecting the President and Vice President.

PARTIES TO THE PROCEEDING

Respondent Steven Howards filed this action against five agents of the United States Secret Service: petitioners Virgil "Gus" Reichle and Dan Doyle; Daniel McLaughlin and Adam Daniels (who were effectively dismissed by the Tenth Circuit's opinion applying qualified immunity to their actions); and Kristopher Mischloney, who was dismissed in the district court.

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OPINIONS BELOW

The Tenth Circuit's opinion is reported at 634 F.3d 1131 and is reproduced in the appendix to the petition for certiorari ("Cert. App.") at 1-43.

The oral ruling of the United States District Court for the District of Colorado denying petitioners' motion for summary judgment on qualified immunity grounds is unreported and is reproduced at Cert. App. 46-61.

JURISDICTION

Respondent Steven Howards brought this action under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that petitioners, United States Secret Service Agents Virgil "Gus" Reichle and Dan Doyle, arrested him in retaliation for exercising his First Amendment rights in the course of Howards' encounter with former Vice President Richard Cheney. The District Court exercised federal question jurisdiction under 28 U.S.C. § 1331. Joint Appendix ("JA") 6, 179.

The Tenth Circuit exercised appellate jurisdiction under 28 U.S.C. § 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (permitting interlocutory appeals from the denial of qualified immunity). Cert. App. 9. The judgment of the Tenth Circuit was entered on March 14, 2011. Cert. App. 1.

This Court granted certiorari on December 5, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech. . . ."

The relevant statutory provision involved is 18 U.S.C. § 3056, which provides:

> (a) Under the direction of the Secretary of Homeland Security, the United States Secret Service is authorized to protect the following persons:
>
> (1) The President, the Vice President (or other officer next in the order of succession to the Office of President), the President-elect, and the Vice President-elect.
>
> * * *
>
> (7) Major Presidential and Vice Presidential candidates and, within 120 days of the general Presidential election, the spouses of such candidates. . . .
>
> * * *
>
> (c)
>
> (1) Under the direction of the Secretary of Homeland Security, officers and agents of the Secret Service are authorized to – . . .

* * *

(C) make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. . . .

* * *

(d) Whoever knowingly and willfully obstructs, resists, or interferes with a Federal law enforcement agent engaged in the performance of the protective functions authorized by this section or by section 1752 of this title shall be fined not more than $1,000 or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

Because this case comes before the Court on interlocutory appeal from the denial of petitioners' motion for summary judgment on qualified immunity, the courts below considered the following facts in the light most favorable to respondent Steven Howards. Cert. App. 3 n.1.

On June 16, 2006, respondent Howards was taking his son to a piano recital in Beaver Creek, Colorado. While walking through the Beaver Creek Mall, an outdoor shopping center, Howards saw then-Vice President Cheney shaking hands and having his picture taken with members of the public. Howards

decided to approach the Vice President to protest the Administration's policies regarding Iraq. JA 7, 106-14.

On that day, petitioners Gus Reichle and Dan Doyle were part of the Secret Service detail protecting Vice President Cheney. JA 8-9. The area was "unmagged," meaning people had not been screened with a metal detector for weapons. JA 46. Agent Doyle heard Howards state into his cell phone, "I'm going to ask him [the Vice President] how many kids he's killed today." JA 83, 109, 166. The comment prompted Agent Doyle to "keep an eye" on Howards. JA 84. Agent Doyle also noted that Howards "appeared anxious about something," JA 83, and was moving quickly and erratically through the crowd. JA 84, 86-87. Agent Doyle did not know at the time that Howards had lost track of his young son, and was looking for him in the crowd throughout the episode. JA 133. Howards was also holding an opaque bag, which the agents later determined contained a pair of shoes. JA 46, 92, 124.

Howards approached the Vice President "in a determined fashion," JA 102, and told him that his "policies in Iraq are disgusting." JA 114-16. The Vice President responded, "Thank you." JA 116. As he departed, Howards made unsolicited physical contact with the Vice President by touching the Vice President's right shoulder with his open hand. JA 86, 117-18. Howards then walked away. JA 87, 120-21. Agent Doyle, several other Secret Service agents, and both the Vice President's photographer and aide witnessed the encounter. JA 86 (Agent Doyle), 258 and 416

(Agent Daniels), 261 and 343-46 (Agent McLaughlin), 358-63 (Agent Lee), 379-84 (Agent Wurst), 404 (photographer David Bohrer), 102-05 (vice presidential aide Charles Durkin).

As the Protective Intelligence Coordinator, Agent Reichle was called to investigate Howards' encounter with the Vice President. JA 36, 384. Agent Reichle did not witness the encounter, but Agent Doyle told Agent Reichle about Howards' "how many kids he's killed today" comment and Howards' interaction with the Vice President, including the physical contact. JA 39, 44, 88. Agent Reichle approached Howards, identified himself as a Secret Service agent, presented his badge, and asked to speak with Howards. JA 45, 89-90, 128. Howards initially refused and was "not cooperative." JA 45, 129, 131, 241-42, Cert. App. 7, 18.[1] Persisting, Agent Reichle asked Howards if he had assaulted the Vice President, and Howards responded that he had not. JA 131-32. Agent Reichle then asked Howards if he had touched the Vice President, and Howards again answered that he had not. JA 132-33,

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[1] Howards testified that when Agent Reichle asked if he could talk to Howards, Howards simply responded "No, you can't." JA 241-42, 129; *see also* JA 247 (Howards felt he was under no obligation to speak to law enforcement). Agent Reichle, and the other witnesses to the encounter, offered a more colorful account of Howards' response. JA 45, 152, 160, 170, 173. Since there was no dispute that Howards was at least uncooperative, the Tenth Circuit accepted Howards' version under the summary judgment standard and characterized Howards as "not cooperative" with Agent Reichle's attempt to investigate the incident. Cert. App. 7, 18.

242, Cert. App. 7. As Howards would later admit at his deposition, this answer "wasn't accurate." *Id.*

Agent Reichle confirmed the falsity of Howards' statement with the Secret Service agents who had witnessed the encounter and the physical contact. JA 153, 173-74. Agent Reichle then determined that he had probable cause to arrest Howards, based on the fact that Howards had been heard saying "I'm going to ask [the Vice President] how many kids he's killed today" on his cell phone; the fact that the Vice President was interacting with people in an "unmagged" area, including Howards, who was carrying a bag; Howards' unsolicited physical contact with the Vice President; and Howards' refusal to cooperate with Agent Reichle's attempt to investigate the incident. JA 46, 63-64, 145, 152, Cert. App. 8.

Because the incident occurred on a Friday afternoon, if the agents had taken Howards to the U.S. Marshals Service in Denver he would have spent the weekend in jail before he could appear before a federal magistrate judge. JA 67. Agent Reichle therefore took Howards to the Eagle County Sheriff's Department, where he was charged with state law harassment and detained for a few hours until his wife posted a $500 bond. JA 67, 176, Cert. App. 8. The state charges were eventually dismissed and no federal charges were filed. JA 177, Cert. App. 8-9.

Howards sued Agents Reichle and Doyle and other Secret Service agents under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Federal*

Bureau of Narcotics, 403 U.S. 388 (1971), alleging First and Fourth Amendment violations. JA 5-6. He alleged "that the Agents violated his Fourth Amendment rights by an unlawful search and seizure, and his First Amendment rights by retaliating against him for engaging in constitutionally protected speech." Cert. App. 9; JA 5-6. After discovery, the agents moved for summary judgment on immunity grounds. The district court denied their motion, ruling that disputed fact issues regarding the agents' immunity defenses precluded judgment as a matter of law. Cert. App. 49-57.

The agents took an interlocutory appeal to the Tenth Circuit. Agents Reichle and Doyle argued on appeal that they were entitled to qualified immunity because, *inter alia*, they had probable cause to arrest Howards. They also argued that they were entitled to heightened or absolute immunity by virtue of their status as Secret Service agents protecting the Vice President. The United States, represented by the United States Department of Justice, filed an *amicus* brief in support of the agents.

The Tenth Circuit affirmed in part and reversed in part. The panel unanimously rejected Howards' Fourth Amendment claim on the ground that the agents objectively had probable cause to arrest him. A majority of the panel, however, held that probable cause was not a bar to Howards' First Amendment retaliation claim against Agents Reichle and Doyle.

With respect to Howards' Fourth Amendment claim, the Tenth Circuit held that "there is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001." Cert. App. 18. "Agent Reichle received information from three different Secret Service Agents that Mr. Howards had made unsolicited physical contact with the Vice President," yet Howards "claimed, falsely, that he did not touch the Vice President." Cert. App. 18, 20. Indeed, as Howards "conceded in his deposition, he made factually inaccurate statements during his exchange with Agent Reichle." Cert. App. 18. Because the Tenth Circuit held that "the Agents had probable cause to arrest Mr. Howards for violating 18 U.S.C. § 1001," it did "not consider whether probable cause existed for any other offenses." Cert. App. 17-18 n.7.

Although the existence of probable cause barred Howards' Fourth Amendment claim, the panel majority held that probable cause was not fatal to Howards' First Amendment retaliatory arrest claim. Cert. App. 26. The majority observed that in *Hartman v. Moore*, this Court held that "to prevail on a *retaliatory prosecution* claim, a plaintiff must plead and prove the absence of probable cause." Cert. App. 27 (emphasis in original) (citing *Hartman v. Moore*, 547 U.S. 250, 259-60 (2006)). Yet the majority "decline[d] to extend *Hartman*'s 'no-probable-cause requirement' to this retaliatory arrest case." Cert. App. 32. Thus, the majority held that Howards may "proceed with his First

Amendment retaliation claim notwithstanding probable cause existed for his arrest." Cert. App. 34-35.

The majority acknowledged the existence of a circuit split on the question of whether probable cause bars a First Amendment retaliatory arrest claim. It noted that "[i]n the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests." Cert. App. 31 (citing cases from the Sixth, Eighth, Ninth, and Eleventh Circuits). By holding that probable cause does not bar a retaliatory arrest claim, the Tenth Circuit sided with the Ninth Circuit, *see* Cert. App. 31 (citing *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006)), and rejected the contrary majority rule. *See* Cert. App. 34 n.14 (noting that "some of our sister circuits disagree with us on this issue").

Despite *Hartman* and the circuit split, the majority held that, at the time of Howards' arrest, Tenth Circuit law was "clearly established that an arrest made in retaliation of an individual's First Amendment rights is unlawful, even if the arrest is supported by probable cause." Cert. App. 31. The majority so held even while acknowledging that "a conflict among the circuits 'is relevant' to our determination of whether a right is clearly established." Cert. App. 34 n.14. The majority thus remanded the case for a public jury trial on Howards' retaliation claim.

In a footnote, the Tenth Circuit rejected petitioners' argument that, as Secret Service agents protecting the Vice President, they were entitled to

absolute immunity from liability for retaliatory arrest claims for arrests made to protect the Vice President's immediate physical safety. Cert. App. 13-14 n.6.

Finally, the panel rejected Howards' First Amendment claim as against two other Secret Service agents, Daniel McLaughlin and Adam Daniels, on the ground that Howards had offered no evidence of a retaliatory motive on the part of those agents. Cert. App. 36-39.

Judge Kelly concurred in part and dissented in part. In his view, "all of the agents should receive qualified immunity." Cert. App. 40. He noted that "[t]here is a strong argument that *Hartman v. Moore*, 547 U.S. 250 (2006), applies not only to retaliatory prosecutions, but also to retaliatory arrests." Cert. App. 40. And he disagreed with the panel majority's decision to "adopt[ ] a minority view based upon the rationale of *Skoog v. County of Clackamas*." Cert. App. 41. Judge Kelly concluded that Agents Reichle and Doyle should have been granted qualified immunity because "when the arrest in this case occurred, the law simply was not clearly established (nor is it now) that *Hartman* applied only to retaliatory prosecutions and not retaliatory arrests." Cert. App. 41. He reasoned: "Given that the officers are deemed to have probable cause, no objectively reasonable officer on June 16, 2006 would be on notice that probable cause was insufficient to overcome claims of First Amendment retaliation." Cert. App. 41-42.

Agents Reichle and Doyle petitioned for rehearing *en banc*, supported by the United States Department

of Justice and the attorneys general of six States. The Tenth Circuit summarily denied the petition for rehearing *en banc*. Cert. App. 62-63. This Court granted certiorari on December 5, 2011.

SUMMARY OF THE ARGUMENT

Government actors need the reasonable breathing room afforded by qualified immunity so they can perform their discretionary duties without fear of being sued. Probable cause has long served as an objective and workable standard for evaluating the actions of government officials, and for law enforcement officers in particular. This Court recently applied the probable cause standard in *Hartman v. Moore* to bar retaliatory prosecution claims where the prosecution is supported by probable cause.

The presence of probable cause should likewise bar First Amendment retaliatory arrest claims. A no-probable-cause requirement for retaliatory arrest claims would give officers in the field a clearly defined, objective and workable standard to determine when they can and cannot arrest an individual without fear of being sued for retaliation. Requiring such a showing at the outset of a claim would also further the goals of qualified immunity by filtering out unmeritorious claims before discovery and trial.

These protections are particularly important for Secret Service agents who guard the Nation's leaders. The Secret Service's mission requires agents to make

immediate, potentially life-or-death decisions whether to arrest individuals in order to protect the physical safety of the President or other leaders. When a Secret Service agent confronts a suspect who may pose a threat to the President, and the agent has probable cause to arrest that suspect, the agent should not hesitate to act for fear of a potential retaliation claim down the road. Nor should a court second-guess the agent's decision to make an arrest that is supported by probable cause.

Petitioners should also be protected by qualified immunity because the law here was unsettled. At the time of the arrest, several circuit courts had extended the no-probable-cause requirement to retaliatory arrest claims, but the Tenth Circuit had not yet addressed the question in the wake of *Hartman*. As Judge Kelly stated in his dissent from the Tenth Circuit's opinion, no objectively reasonable officer at the time of the arrest would have been on notice that probable cause was insufficient to bar a First Amendment retaliatory arrest claim. A Secret Service agent cannot and should not have to worry about which side of a circuit split a given circuit will join when making a decision whether to arrest a suspect to protect the Vice President's immediate physical safety. Probable cause should be enough.

Moreover, at the time of Howards' arrest, a reasonable Secret Service agent could not have anticipated the possibility of liability for retaliatory arrest in light of prior authoritative case law recognizing absolute immunity against such claims. And no court

had addressed the scope of a Secret Service agent's authority under 18 U.S.C. § 3056 to arrest a suspect who refuses to cooperate with the agent's investigation to determine whether the suspect does indeed pose a threat to the Vice President's safety.

ARGUMENT

I. The Absence of Probable Cause Is Already a Central Requirement in Analogous Retaliatory Prosecution Claims.

In *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), the Court laid out a general framework for constitutional retaliation torts. A plaintiff must show that the defendant took a significant adverse action against the plaintiff, and that the action was substantially motivated by the plaintiff's exercise of constitutionally protected conduct. Defendants will not be liable, however, if they can show that they would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287; *see also Texas v. Lesage*, 528 U.S. 18, 21 (1999) ("The government can avoid liability by proving that it would have made the same decision without the impermissible motive.").

Through *Mount Healthy* and its progeny, this Court has undertaken to define constitutional torts, and to develop the corollary doctrine of qualified immunity, in a way that balances citizens' interest in unfettered exercise of protected constitutional freedoms

with the legitimate need for government actors to perform their discretionary duties without constant fear of damage suits. *See, e.g., Pickering v. Board of Educ.*, 391 U.S. 563, 572-73 (1968); *Butz v. Economou*, 438 U.S. 478, 500-04 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Crawford-El v. Britton*, 523 U.S. 574, 584-600 (1998).

Perhaps the most common type of retaliation is the adverse employment action, where a government employee is fired for speaking out on an issue of public concern, as in *Pickering*. The Court thus has most often examined the balancing of constitutional rights and government interests in the employment setting. *See, e.g., Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Bush v. Lucas*, 462 U.S. 367 (1983); *Connick v. Myers*, 461 U.S. 138 (1983). This case requires the Court to revisit the balancing of these same interests in retaliatory arrest and prosecution claims, a subject last addressed by the Court in *Hartman v. Moore*.

In *Hartman*, this Court recognized that retaliatory arrest and prosecution claims form a distinct case category because the government actors in these cases are law enforcement officers who must base their decisions on probable cause. *Hartman v. Moore*, 547 U.S. 250 (2006). The Court in *Hartman* addressed the constitutional tort of retaliatory prosecution – specifically, the liability of criminal investigators or other government actors who induce prosecutions in

retaliation for a person's exercise of constitutional rights. As with all retaliation claims, *Hartman* focused on causation, with a particular eye on the role of probable cause: "It may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." 547 U.S. at 260. This Court then refined *Mount Healthy*'s general burden-shifting framework for retaliation cases to fit the specifics of retaliatory prosecution and the central role of probable cause in determining causation:

> Like any other plaintiff charging official retaliatory action, the plaintiff in a retaliatory-prosecution claim must prove the elements of retaliatory animus as the cause of injury, and the defendant will have the same opportunity to respond to a prima facie case by showing that the action would have been taken anyway, independently of any retaliatory animus. *What is different about a prosecution case, however, is that there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge.* Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest

> that prosecution would have occurred even without a retaliatory motive.

Hartman, 547 U.S. at 260-61 (emphasis added).

The Court observed how the intervening actions of the prosecutor required that a causal connection be shown between the retaliatory animus of the defendant investigator and the action of the prosecutor, who has absolute immunity from suit. *Hartman*, 547 U.S. at 261-62. The Court therefore saw fit to require that a retaliatory prosecution plaintiff prove that he was prosecuted without probable cause in order to bridge this causal gap. *Id.* at 262-63. Given the "presumption of regularity accorded to prosecutorial decisionmaking," where there is probable cause and a prosecutor chooses to proceed with prosecution, a court can confidently conclude that the prosecutor would have prosecuted even without the retaliatory inducement of the defendant investigator. *Id.* at 263. This Court therefore defined the tort of retaliatory prosecution to require the absence of probable cause, but left open the question of whether a similar analysis would apply to retaliatory arrest situations. *Id.* at 265-66 ("Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case, and we hold that it must be pleaded and proven."). This holding effectively confers qualified immunity from retaliation claims on all criminal investigators and other government actors who urge

prosecution, when the prosecution is supported by probable cause. *Id.*

II. Several Circuit Courts Hold that Probable Cause Bars Retaliatory Arrest Claims.

Guided by *Hartman*, six circuits have now explored the role that probable cause, or the lack of it, should play in the tort of retaliatory arrest. The Tenth Circuit's holding below that Howards can "proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest," Cert. App. 34-35, conflicts with the majority rule established in at least four other circuit court decisions.

A. The Second, Sixth, Eighth, and Eleventh Circuits Apply *Hartman*'s No-Probable-Cause Rule to Retaliatory Arrest Cases.

Decisions from the Second, Sixth, Eighth and Eleventh Circuits have applied *Hartman*'s no-probable-cause requirement to retaliatory arrest cases.

In *Golodner v. City of New London*, 2011 WL 5083503 (2d Cir. 2011) (unpublished), the Second Circuit held that "[e]ven if Golodner did not waive his retaliation claim, we affirm the District Court's dismissal on the alternate ground that the existence of probable cause is a complete defense to a claim of retaliatory arrest. The District Court found that all of Golodner's arrests were based on probable cause; therefore, his First Amendment claim fails on a retaliation theory as well." *Id.* at *2. *Accord Morgan v.*

County of Nassau, 720 F. Supp. 2d 229, 238 (E.D.N.Y. 2010) ("[I]f a police officer has probable cause to arrest a person, this will serve as a complete defense to any claim of First Amendment retaliation based on that arrest.") (citing the pre-*Hartman* decision of *Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) ("[B]ecause defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be taken.")).

In *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006), the Sixth Circuit reasoned that the justification for *Hartman* is broad and applies beyond the narrow field of retaliatory prosecution. In *Barnes*, the plaintiff was arrested for his confrontation with two police officers, based on a grand jury indictment. *Id.* at 712-13. In Barnes' subsequent retaliation lawsuit, the Sixth Circuit discussed whether the presence of probable cause for the arrest should confer qualified immunity upon the officers against Barnes' retaliatory arrest claim. Discussing *Hartman*, the *Barnes* court noted that "[t]he concerns regarding the intervening actions of a prosecutor do not apply in this case, because the officers themselves initiated the grand jury proceedings against Barnes." *Id.* at 720. The *Barnes* court nonetheless held that a plaintiff must still show a lack of probable cause in order to proceed with a First Amendment retaliation claim. The *Barnes* court reasoned that "*Hartman* appears to acknowledge that its rule sweeps broadly" and that "the [Supreme] Court noted that causation in retaliatory-prosecution cases is '*usually* more complex than it is in other retaliation

cases.'" *Id.* (emphasis supplied by *Barnes*.) *But see Kennedy v. City of Villa Hills*, 635 F.3d 210, 217 n.4 (6th Cir. 2011) (limiting *Barnes* to claims of wrongful arrest when "prosecution and arrest are concomitant.").

In *McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010), two Secret Service agents faced retaliation claims for their decision to arrest protesters at a rally for former President George W. Bush, based on the protesters' refusal to follow a Secret Service agent's direction to move to a different location. The Eighth Circuit reasoned that *Hartman*'s rule should extend to retaliatory arrest claims, holding that both *Bivens* and § 1983 plaintiffs claiming First Amendment retaliatory arrest must "plead and prove a lack of probable cause for the underlying charge pursuant to the Supreme Court's decision in *Hartman v. Moore*." *Id.* at 1075. In so holding, the Eighth Circuit followed its earlier decision in *Williams v. City of Carl Junction*, in which it "agree[d] with the Sixth Circuit that the Supreme Court's holding in *Hartman* is broad enough to apply even where intervening actions by a prosecutor are not present." 480 F.3d 871, 876 (8th Cir. 2007).

In *Phillips v. Irvin*, 222 Fed. Appx. 928 (11th Cir. 2007), the Eleventh Circuit held that "arguable probable cause to arrest" was sufficient to confer qualified immunity against a First Amendment retaliation claim. *Id.* at 929. *Phillips* cited *Redd v. City*

of Enterprise, 140 F.3d 1378 (11th Cir. 1998), a pre-*Hartman* decision, which held:

> When a police officer has probable cause to believe that a person is committing a particular public offense, he is justified in arresting that person, even if the offender may be speaking at the time that he is arrested. Likewise, when an officer has *arguable* probable cause to believe that a person is committing a particular public offense, he is entitled to qualified immunity from suit, even if the offender may be speaking at the time that he is arrested.

Id. at 1383-84 (emphasis in original, citations omitted).

B. The Ninth and Tenth Circuits Permit Retaliatory Arrest Claims Despite Probable Cause to Arrest.

In *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006), a police officer, armed with a warrant, seized Skoog's video cameras that Skoog had used to record police activity and support his lawsuits against police officers. 469 F.3d at 1225-26. The officer commented at the time of the seizure that "people shouldn't sue cops." *Id.* at 1227. Because the search and seizure were supported by probable cause, the Ninth Circuit rejected Skoog's Fourth Amendment claim. *Id.* at 1231. On Skoog's First Amendment retaliation claim, the Ninth Circuit reviewed *Hartman*'s causation analysis and held that "the rationale for

requiring the pleading of no probable cause in *Hartman* is absent here. This case presents an 'ordinary' retaliation claim." *Id.* at 1234.

The Ninth Circuit retreated from *Skoog* somewhat in *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008), stating that "under *Hartman*, if a plaintiff can prove that the officials secured his arrest or prosecution without probable cause and were motivated by retaliation against the plaintiff's protected speech, the plaintiff's First Amendment suit can go forward." *Id.* at 863-64. In a footnote, the *Beck* court cited *Skoog* for the proposition that "plaintiffs stating 'ordinary' retaliation claims posing less complicated causation problems than that addressed in *Hartman*, including actions concerning retaliatory searches, need not allege and show the absence of probable cause." *Id.* at 864 n.12 (quotation marks and brackets omitted).

Most recently, in *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892 (9th Cir. 2008), the Ninth Circuit characterized *Skoog* as holding that Skoog's First Amendment retaliatory arrest claim survived summary judgment because "there was barely enough evidence to conclude that there was probable cause, while there was strong evidence of a retaliatory motive." 548 F.3d at 901. The *Dietrich* court then concluded that the claim before it was precluded because it "has very strong evidence of probable cause and very weak evidence of a retaliatory motive." *Id.*

The Ninth Circuit thus appears to be crafting a sliding scale and case-by-case rule of qualified immunity that requires courts to evaluate the relative strength of the probable cause to arrest, the relative strength of the retaliatory motive of the arresting officer, and the complexity of the causal link between the retaliatory motive and arrest. The Ninth Circuit has not addressed how courts are to develop and balance all of these factors consistent with the goal of "resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

In the case at bar, the Tenth Circuit recognized the circuit split and chose to side with the minority view articulated by the Ninth Circuit in *Skoog*, with no consideration of the Ninth Circuit's subsequent qualifications in *Beck* or *Dietrich*. Cert. App. 26-36. The Tenth Circuit grounded its holding on its understanding that all retaliation claims against arresting officers are necessarily "ordinary retaliation claim[s]" under *Hartman*'s analysis; and "unlike prosecutors, Secret Service Agents enjoy no presumption of regularity regarding their decisionmaking." Cert. App. 32-33.

III. Qualified Immunity Should Shield Against Retaliatory Arrest Claims Where the Arrest Was Supported by Probable Cause.

The question now before the Court is whether it should require a showing of the absence of probable

cause in retaliatory arrest cases, as it did in *Hartman* for retaliatory prosecution claims. Extending *Hartman* in this fashion would effectively confer qualified immunity from claims of retaliatory arrest on law enforcement officers when the arrest is supported by probable cause.

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. at 818). The doctrine of qualified immunity recognizes the "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow*, 457 U.S. at 807. The doctrine balances the interest of officials with the interest of citizens in the unfettered exercise of their constitutional rights. *Id.*; *Davis v. Scherer*, 468 U.S. at 195. The doctrine is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Al-Kidd*, 131 S. Ct. at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). *See also Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (recognizing that official immunity analysis considers the "scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action," which may include an "atmosphere of confusion, ambiguity, and swiftly moving events"), *modified by Harlow v.*

Fitzgerald, 457 U.S. 800 (1982). The doctrine recognizes the importance of giving government actors appropriate breathing room for discretionary decisions, rather than subjecting every decision to judicial second-guessing and thereby chilling government actors' willingness to perform their jobs due to constant liability concerns. *Hunter v. Bryant*, 502 U.S. at 229.

Moreover, because "the entitlement is an immunity from suit, rather than a mere defense to liability," the Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. at 227 (citations and quotes omitted); *Harlow*, 457 U.S. at 818; *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Malley v. Briggs*, 475 U.S. at 341; *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

A. The Absence of Probable Cause Should Be a Required Element of All Retaliatory Arrest Claims.

As the majority of circuit courts facing the issue have done, this Court should extend *Hartman*'s no-probable-cause requirement to retaliatory arrest claims. This extension would define the tort of retaliatory arrest to recognize that law enforcement officers do not violate First Amendment rights by making an arrest based on probable cause.

To be sure, probable cause may be somewhat less probative of whether an arrest would have occurred

anyway, because law enforcement officers do not always arrest when they have probable cause to do so. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760-62 (2005). There are several sound reasons unrelated to causation, however, for defining the tort of retaliatory arrest to require an absence of probable cause.

Even if probable cause may not be as probative of causation in the retaliatory arrest context as it is in retaliatory prosecution claims, it is still highly probative and thus serves to provide an important objective measure to properly balance a citizen's exercise of constitutional freedoms and government's legitimate public safety concerns. *See Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (probable cause standard "protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'") (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). *See also Zurcher v. Stanford Daily*, 436 U.S. 547, 563-67 (1978) (holding that First Amendment concerns were adequately protected by police officer's compliance with Fourth Amendment's probable cause requirement in search of newspaper's offices).

A no-probable-cause rule also has the advantage of being readily applied at the outset of a retaliatory arrest case. As this Court emphasized in *Hunter v. Bryant*, qualified immunity is an immunity from suit – including burdensome discovery – that should be applied at the earliest possible stage of proceedings. 502 U.S. at 227; *see also Crawford-El v. Britton*, 523

U.S. at 585, 588 (retaliation claims implicate "obvious concerns with the social costs of subjecting public officials to discovery and trial, as well as liability for damages" and "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery."). A no-probable-cause rule protects government officials from such social costs because it is an objective standard that can be applied as a threshold matter to eliminate untenable retaliation claims before government officials are required to submit to extensive discovery and summary judgment motions. *Compare Dietrich*, 548 F.3d at 901 (developing Ninth Circuit's approach of evaluating and weighing the relative strengths of probable cause, retaliatory motive, and causal link between the retaliatory motive and arrest, which presumably would require full discovery).

An objective no-probable-cause rule would also give law enforcement officers much needed clarity in the field. Unlike decisions to prosecute, a law enforcement officer's decision to arrest often involves *immediate* public safety considerations, and the qualified immunity doctrine recognizes that arresting officers are entitled to err on the side of protecting the public when forced to act decisively. *E.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 198-201 (2004); *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Qualified immunity is particularly important for decisions at the margin. Facing a close call on whether to arrest a suspect is precisely when qualified immunity matters most. Thus, contrary to the Ninth Circuit's suggestion in *Dietrich*

that entitlement to qualified immunity should depend on the strength of probable cause, the whole point of qualified immunity is to offer protection where probable cause is present but not necessarily strong. *Harlow*, 457 U.S. at 807 (qualified immunity serves the legitimate "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."); *Pierson v. Ray*, 386 U.S. 547, 555 (1967) ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."). The objective nature of a no-probable-cause rule would allow officers in the field the confidence to make probable cause arrests without fear of potential retaliation claims.

The Court has forcefully articulated its commitment to objective standards in its pretext cases, particularly *Whren v. United States*, 517 U.S. 806 (1996). *Whren* involved a Fourth Amendment challenge based on the claim that police officers made a traffic stop for speeding as a pretext to search for drugs. 517 U.S. at 808-09. The Court rejected this challenge, explaining that only an "undiscerning reader" of the Court's pretext decisions "would regard these cases as endorsing the principle that ulterior motives can invalidate police conduct that is justifiable on the basis of probable cause to believe that a violation of law has occurred." *Id.* at 811. The Court emphatically discussed the importance and value of probable cause as an objective standard to govern

police conduct: "We flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification" because "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 812-13 (citations omitted).

This analysis applies with equal force in the present context of retaliatory arrest claims. Law enforcement officers similarly need and deserve an objective, bright-line rule to apply in the field when deciding whether to arrest under circumstances that might give rise to a retaliation claim. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (a constitutional rule governing arrest "[o]ften enough . . . has to be applied on the spur (and in the heat) of the moment," and the object is "to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second guessing months and years after an arrest or search is made."); *New York v. Belton*, 453 U.S. 454, 458 (1981) (Fourth Amendment rules "ought to be expressed in terms that are readily applicable by the police . . . and not qualified by all sorts of ifs, ands, and buts") (quotations omitted). *See also Crawford-El v. Britton*, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting) (defendants should be entitled to immunity from retaliation claims, regardless of their subjective intent, if some "objectively valid" legal ground exists for their action). Probable cause provides that objective standard.

For all these reasons, the Court should extend *Hartman*'s no-probable-cause rule to retaliatory arrests

by defining the tort to require a claimant to plead and prove the absence of probable cause. Such a rule would recognize that all law enforcement officers are entitled to qualified immunity from retaliatory arrest claims when their decision to arrest is supported by probable cause.

B. Qualified Immunity Is Particularly Important for Secret Service Agents Acting in Their Protective Capacity.

This Court takes care to approach qualified immunity analysis based on specific case categories, rather than to craft rules at a high level of generality. *E.g.*, *Al-Kidd*, 131 S. Ct. at 2084; *Brosseau*, 543 U.S. at 198-201; *Saucier*, 533 U.S. at 201; *Anderson v. Creighton*, 483 U.S. at 639-40. Here, a critically important and dispositive aspect is the fact that petitioners were not ordinary law enforcement officers performing ordinary law enforcement functions – they were Secret Service agents acting as the Vice President's personal bodyguards. This special function of Secret Service agents warrants application of a no-probable-cause rule when agents make an arrest in the course of protecting the immediate physical safety of the President, Vice President, or other officials.[2]

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[2] Secret Service agents wear two hats: they serve as bodyguards to the President and other high officials, and they also perform criminal investigative functions. 18 U.S.C. § 3056. The qualified immunity argument advanced here would apply only to Secret Service agents functioning in their protective capacity.

(Continued on following page)

1. The Secret Service's Statutory Mission Merits Qualified Immunity.

Few events are more debilitating to the Nation than the assassination of the President. "The Nation undoubtedly has a valid, even overwhelming, interest in protecting the safety of its Chief Executive." *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam). As Justice Breyer stated in *Rubin v. United States*, "[t]he physical security of the President of the United States has a special legal role to play in our constitutional system. . . . He is the head of state. He and the Vice President are the only officials for whom the entire Nation votes." 525 U.S. 990, 992 (1998) (Breyer, J., dissenting from denial of certiorari). It is an "obvious fact that serious physical harm to the President is a national calamity." *Id.* at 991.

Secret Service agents are charged with protecting the safety of the President, Vice President, presidential candidates and other specific persons. 18 U.S.C. § 3056. Secret Service agents on protective detail must make split-second decisions that could have life-or-death consequences for their charges, and dire consequences for the Nation. It is thus vitally important that Secret Service agents act without hesitation, including when deciding whether to arrest persons who appear to pose a threat. Indeed, Secret Service

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The argument might also apply to other duly authorized government bodyguards, such as U.S. Marshals protecting a federal judge or state troopers protecting a governor, but those situations are not before the Court.

agents are trained to be able to react instinctively and reflexively in these situations – they do not have the luxury to deliberate that prosecutors, investigators, and judges often do.

Of course, Secret Service agents will never consciously allow their critical protective duties to be compromised by fear of potential legal liability – if they will take a bullet for the President, they will certainly take a lawsuit. But even for Secret Service agents, qualified immunity may play a meaningful role at the margin, when an agent is faced with a close call in determining whether a political protester is harmless or might actually pose a threat to the President's safety. *Rubin*, 525 U.S. at 994 (Breyer, J., dissenting from denial of certiorari) (noting how "presidential security may turn on close questions of degree"). Therefore, applying a no-probable-cause rule for retaliatory arrest claims brought against Secret Service agents is especially justified. *See Hunter v. Bryant*, 502 U.S. at 229.

Hunter v. Bryant is particularly instructive because it is this Court's only decision directly addressing qualified immunity for Secret Service agents. There, James Bryant penned a rambling letter about a plot to assassinate President Reagan by a "Mr. Image." 502 U.S. at 224-25. When the letter reached Secret Service agents, President Reagan was traveling in West Germany and therefore not directly threatened by Bryant, who was in California. *Id.* at 225. Secret Service agents immediately located and interviewed Bryant, who "admitted writing and delivering

the letter, but refused to identify 'Mr. Image' and answered questions about 'Mr. Image' in a rambling fashion." *Id.* When Bryant continued to be uncooperative, the Secret Service agents arrested him. *Id.* at 225-26. After the government declined to prosecute Bryant, he filed a *Bivens* action against the arresting agents. *Id.* at 226. Bryant's suit was soon reduced to his claim for Fourth Amendment violations, which focused on whether the agents had probable cause to arrest him when they did. *Id.* The Ninth Circuit denied qualified immunity to the agents, holding that while Bryant's letter could be read as a threat to President Reagan, that was not the most reasonable interpretation of the letter. *Id.* at 227.

In reversing the Ninth Circuit, this Court focused on the unique responsibility of Secret Service agents in protecting the President:

> Our cases establish that qualified immunity shields agents Hunter and Jordan from suit for damages if a reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed. *Even law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity*. Moreover, because "[t]he entitlement is an immunity from suit, rather than a mere defense to liability, we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.
>
> * * *

> [Even if the agents were mistaken in their belief that they had probable cause to arrest Bryant], the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken.
>
> The qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law. This accommodation for reasonable error exists because officials should not err always on the side of caution because they fear being sued. *Our national experience has taught that this principle is nowhere more important than when the specter of Presidential assassination is raised.*

Id. at 227-29 (emphases added; quotations and citations omitted). In a concurrence, Justice Scalia observed that while an erroneous immunity analysis might be mere error in other contexts, such an error should not be permitted to stand "with respect to those who guard the life of the President." 502 U.S. at 229 (Scalia, J., concurring).

Other cases from this Court and circuit courts similarly recognize the need for a broad rule of qualified immunity when the safety of the President or other high public officials is at stake. *See Saucier v. Katz*, 533 U.S. at 209 (military police officer who seized protestor approaching the Vice President was entitled to qualified immunity in light of his "duty to protect the safety and security of the Vice President of the United States from persons unknown in number"),

receded from on other grounds, *Pearson v. Callahan*, 555 U.S. 223 (2009); *McCabe v. Parker*, 608 F.3d 1068, 1075-78 (8th Cir. 2010) (Secret Service agents entitled to qualified immunity against protesters' retaliatory arrest claims, where protesters were arrested for violating 18 U.S.C. § 3056(d) based on protesters' refusal to cooperate with Secret Service agent's instructions to move out of a blocked-off location at a rally for former President George W. Bush).

Here, the decision to arrest Howards was based on considerations like those in *Hunter*, *Saucier* and *McCabe*. It is undisputed that Howards was uncooperative with Agent Reichle's efforts to evaluate whether he posed a threat; and when Howards did answer questions, he lied by denying that he had touched the Vice President. While Howards may not have directly raised the specter of assassination the way Bryant did, Agents Reichle and Doyle were faced with comparable concerns: the Vice President was interacting with the public in an open-air, unmagged area; Howards appeared to be acting suspiciously; and had the agents let Howards go without having satisfied themselves that he posed no threat, they did not know what Howards might do next. In such circumstances, the doctrine of qualified immunity provides breathing room precisely to allow Secret Service agents to eliminate even small potential risks to the Vice President's safety without fear of civil liability. When it comes to protecting the President, Vice President or other individuals singled out in 18 U.S.C. § 3056, there is no such thing as a small mistake.

In light of the need for Secret Service agents to exercise this exceptional degree of caution, the Court in *Hunter* held that qualified immunity would apply even if the agents *lacked* probable cause to arrest, as long as there was some reasonable basis for a Secret Service agent to assess some degree of threat to the President. 502 U.S. at 228-29. In the case at bar, it is undisputed that Agents Reichle and Doyle had a reasonable basis for arresting Howards, because the arrest was supported by probable cause.

2. Secret Service Agents on Protective Detail Should Enjoy a Presumption of Regularity.

The Court in *Hartman* grounded its qualified immunity rule in part on "the longstanding presumption of regularity accorded to prosecutorial decisionmaking." *Hartman*, 547 U.S. at 263. In declining to apply qualified immunity here, the Tenth Circuit commented that "unlike prosecutors, Secret Service Agents enjoy no presumption of regularity regarding their decisionmaking." Cert. App. 33. But they should.

The presumption of prosecutorial regularity is a common law construct, driven by the judiciary's respect for the commitment of prosecutorial decisions to the executive branch, and the "recognition that the decision to prosecute is particularly ill-suited to judicial review." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90 (1999). The conduct of Secret Service agents in their role as

the President's personal bodyguards is similarly executive in nature and ill-suited for judicial review. A presumption of regularity is further supported by the extensive and thorough training that Secret Service agents undergo before they take up their positions as personal bodyguards.

The nature of the encounters between Secret Service agents and political protesters also supports the recognition of a presumption of "protective regularity" for their arrest decisions. This Court has generally recognized that public officials enjoy a presumption of validity for their actions. *Banks v. Dretke*, 540 U.S. 668, 696 (2004); *United States v. Armstrong*, 517 U.S. 456, 464 (1996). While this general presumption applies to all law enforcement officers, it applies with particular force to Secret Service agents acting in a protective capacity. The President and Vice President are frequent targets for political protesters, and Secret Service agents are trained to deal with these protests. Secret Service agents routinely encounter anonymous crowds of vocal, strident protesters who the agents expect will engage in speech that may be strongly critical of their protectee. In these charged situations, a Secret Service agent's only concern is being an effective bodyguard.

This dynamic stands in sharp contrast to the more routine police encounters that typically lead to retaliatory arrest claims. The retaliatory arrest cases that comprise the circuit split provide apt examples. In *Skoog v. County of Clackamas*, the arrestee had a long and contentious history of videotaping local

police and suing them, prompting the officer executing the search warrant and seizing Skoog's cameras to comment that "people shouldn't sue cops." 469 F.3d 1221, 1227 (9th Cir. 2006). *v. Wright* involved repeated, escalating encounters between a gun-toting outdoorsman and a Kentucky Department of Fish and Wildlife Resources officer. 449 F.3d 709, 711-12 (6th Cir. 2006). Other First Amendment retaliatory arrest cases involve similarly contentious encounters between police and local actors, of the sort that eventually prompt a police officer to warn: One more word out of you and you're under arrest! *See, e.g., Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341, 346 (1st Cir. 1995) ("You better shut up your [expletive] mouth before I arrest you too."); *King v. Ambs*, 2006 WL 800751 at *2 (E.D. Mich.) ("One more word and I will arrest you."), *aff'd*, 519 F.3d 607 (6th Cir. 2008). Secret Service arrests do not typically follow this pattern – not here or in any other reported Secret Service arrest cases. *Compare Hunter v. Bryant*, 502 U.S. at 225-26; *McCabe v. Parker*, 608 F.3d at 1072; *Galella v. Onassis*, 487 F.2d 986, 992 (2d Cir. 1973).

Thus, when highly-trained Secret Service agents decide to arrest suspects they believe may pose an immediate threat to the President's safety, those decisions deserve the same presumption of regularity that supported qualified immunity in *Hartman* – a presumption that the agents are acting out of genuine concern for the President's safety, rather than out of a desire to retaliate against citizens of differing political bent. The responsibility of Secret Service agents,

their commensurate training, and the nature of their encounters with political protesters all support such a presumption, which in turn supports application of qualified immunity here.

3. For Secret Service Agents on Protective Detail, Retaliatory Animus Cannot Be Inferred from the Content of a Protester's Speech.

Qualified immunity is also appropriate for Secret Service agents acting in their protective capacity because the very nature of their job requires them to consider the content of speech in evaluating potential threats. The content of a protester's speech will rarely if ever be probative of retaliatory animus for such agents. To the contrary, a Secret Service agent may justifiably consider the content of protected political speech when that speech has any possible implication for the immediate physical safety of the President.

Presidential assassins are usually politically motivated, and political motivations naturally manifest themselves through speech that will often be protected by the First Amendment. "Sic semper tyrannis" (thus always to tyrants) is protected political speech, and fully consonant with mainstream American political values – the phrase appears on the State Seal of Virginia. But if someone shouts this phrase during an "unmagged" event where the President is holding a public meet-and-greet, a Secret Service agent might justifiably stop and maybe even arrest that person

because of the obscure Latin phrase's close association with Booth's assassination of Lincoln. Secret Service agents should at least be entitled to consider this protected political speech in their assessment of whether the speaker poses a potential threat.

Here, Howards attracted the attention of the Secret Service when he was overheard saying "I'm going to ask him [the Vice President] how many kids he's killed today." That sort of language will justifiably garner the attention of a Secret Service agent on protective detail. Agent Doyle testified that Howards' statement prompted him "to keep an eye" on Howards, not because Agent Doyle took offense at Howards' language, but because the language indicated that Howards was upset with Vice President Cheney and was approaching him in an adversarial manner. A Secret Service agent may justifiably pay special attention to such a protester for purely protective reasons. JA 84.[3]

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[3] For the same reasons, passengers in TSA security lines at airports know better than to talk about bombs or hijacking. It is of course possible to speak about bombs and hijacking with full First Amendment protection in this situation, but a passenger who chooses to do so assumes the risk of being detained for questioning and missing his flight, at the very least. This is not to suggest that a political protester should therefore refrain from criticizing the Vice President to his face when the opportunity arises – just that a protester who does so the way Howards did here similarly assumes the risk of a response from the Secret Service.

Thus, for Secret Service agents in a protective role, the content of a protester's protected political speech will generally provide no support for a First Amendment retaliation claim. *See Hartman*, 547 U.S. at 256 (retaliation claim is cognizable only where "non-retaliatory grounds are insufficient to provoke adverse consequences"). While Agents Doyle and Reichle could explain this to a jury and hope to be exonerated at trial, a key purpose of qualified immunity is to relieve them of this burden. *E.g.*, *Hunter v. Bryant*, 502 U.S. at 227.

IV. Agents Reichle and Doyle Should Be Protected by Qualified Immunity in This Particular Matter.

Based on the specific circumstances of this case, this Court should extend qualified immunity as a bar to this particular action because of the unsettled state of the law. At the time of Howards' arrest, only two months after this Court had issued its decision in *Hartman*, the law was unsettled in several dispositive respects: (a) it was unclear whether probable cause immunized an arresting officer from a claim for retaliatory arrest, as evidenced by the circuit split on this very issue that developed after Howards' arrest; (b) the only circuit case addressing the scope of a Secret Service agent's immunity from a claim for retaliatory arrest, *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), recognized and applied absolute immunity; (c) the scope of a Secret Service agent's authority to require a suspect to answer an agent's questions posed

as part of an investigation to ensure the Vice President's safety under 18 U.S.C. § 3056 had never been addressed; and (d) the length and complexity of the Tenth Circuit's analysis itself shows that the law was not clearly settled for purposes of qualified immunity.

A. The Post-*Hartman* Circuit Split Shows that the Law Was Unsettled.

In *Wilson v. Layne*, 526 U.S. 603 (1999), the Court observed that when an alleged constitutional tort takes place and a circuit split then develops over whether that tort is cognizable, the existence of the split itself confirms that the law was not settled and qualified immunity applies:

> Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed [over whether the conduct at issue gave rise to a constitutional claim]. *If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.*

526 U.S. at 618 (emphasis added, citations omitted).

Here, the Tenth Circuit expressly acknowledged that a circuit split had developed after Howards' arrest. Cert. App. 31-32 ("In the wake of *Hartman*, our sister circuits continue to be split over whether *Hartman* applies to retaliatory arrests."). That observation should have led the Tenth Circuit to apply qualified immunity under *Wilson* because (as Judge

Kelly noted in his dissent) there was every reason to believe that the Tenth Circuit would join the majority side of the split and dismiss Howards' retaliation claim in light of the agents' probable cause to arrest.

Applying qualified immunity based on the subsequent circuit split is especially appropriate here in light of the national scope of the Secret Service's duties. *See Ashcroft v. Al-Kidd*, 131 S. Ct. at 2086-87 (Kennedy, J., concurring) (discussing the importance of uniform national rules to govern the conduct of government actors who work throughout the nation). Secret Service agents act as bodyguards throughout the country. They should not be expected to, and as a practical matter cannot, modify their operations depending on the particular circuit where they perform their protective duties.

Here, Agents Reichle and Doyle were protecting the Vice President in a circuit that had not yet addressed the scope of *Hartman* in the retaliatory arrest context. As Judge Kelly stated in his dissent, "no objectively reasonable officer on June 16, 2006 would be on notice that probable cause was insufficient to overcome claims of First Amendment retaliation." Cert. App. 41-42. Agents Reichle and Doyle should not be subjected to Howards' damages lawsuit because they followed the law of the majority of circuits in arresting Howards, rather than anticipating that the Tenth Circuit would adopt the minority view of the Ninth Circuit in *Skoog* (which even the Ninth Circuit has qualified in *Deitrich*).

B. Prior Case Law Conferring Absolute Immunity Contributed to the Law's Unsettled State.

The law was also unsettled at the time of the arrest because the most authoritative case addressing a Secret Service agent's potential liability stemming from an arrest to protect the immediate physical safety of a protectee recognized a rule of *absolute* immunity from suit. In *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), paparazzo Ronald Galella repeatedly hounded Jacqueline Kennedy Onassis and her children John and Caroline, all of whom were protected by the Secret Service under 18 U.S.C. § 3056. The Secret Service arrested Galella after he jumped into the path of young John when he was biking in Central Park, nearly causing him to crash. 487 F.2d at 992. After Gallela was prosecuted and acquitted, he sued the Secret Service agents for false arrest. *Id.*

The Second Circuit held that the Secret Service agents were entitled to "an absolute privilege" as against Gallela's false arrest and malicious prosecution claims. 487 F.2d at 993 n.5. The Second Circuit explained:

> The protective duties assigned the agents under [18 U.S.C. § 3056] . . . require the instant exercise of judgment which should be protected. . . . The issue in each case is whether the public interest in a particular official's unfettered judgments outweighs the private rights that may be violated. The

> protective duties of the agents on assignments similar to this warrant this protection.

Id. at 993, 994 (footnotes and citation omitted). The Second Circuit added that "the duty of protecting the personages singled out by Congress as in need of this extraordinary shield from likely harm is *toto coelo* different from the normal police function of arrest for law violation on warrant or on probable cause as in *Bivens*." *Id.* at 994 n.9. *Accord Scherer v. Brennan*, 379 F.2d 609, 611 (7th Cir. 1967) (holding Treasury Department agents acting at direction of Secret Service "were immune from [plaintiff's] tort suit because their actions fell within the scope of their duties to protect the person of the President of the United States" under 18 U.S.C. § 3056), *cert. denied*, 389 U.S. 1021 (1967).

Galella has been recognized as articulating a rule of absolute immunity. *Martin v. Malhoyt*, 830 F.2d 237, 249 n.31 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.) (stating that the court in *Galella* held that "United States Secret Service agents carrying out special statutory duty [are] shielded by absolute immunity from common law false arrest liability"). This recognition came almost a decade after the Court's development of the modern jurisprudence of absolute immunity in *Butz v. Economou*, 438 U.S. 478 (1978). And *Galella*'s absolute immunity holding has never been questioned or criticized by this Court or the Tenth Circuit.

Galella was extensively discussed in the briefing before the Tenth Circuit. The Tenth Circuit might have

chosen to disagree with the Second Circuit's analysis in *Galella* (particularly since it predated this Court's modern jurisprudence of absolute immunity in *Butz*), but the Tenth Circuit could not ignore that *Galella* was the leading authority in 2006, and that under the absolute immunity holding of *Galella* petitioners did not violate clearly established law by arresting Howards. Thus, regardless of whether the analysis of *Galella* should apply here to confer absolute immunity (a position that petitioners have chosen not to advance), *Galella*'s authoritative analysis at the time of Howards' arrest provides another sound basis for recognizing qualified immunity.

C. Qualified Immunity Should Apply Because Agents Reichle and Doyle Arrested Respondent Howards Under the Special Statutory Authority of 18 U.S.C. § 3056.

At the time of the arrest, the law was also unsettled because no court had discussed the scope of a Secret Service agent's authority to arrest a protester who refuses to cooperate with an investigation under 18 U.S.C. § 3056.

In its bench ruling denying petitioners' motion for summary judgment on qualified immunity, the District Court stated:

> Defendants cannot seriously dispute the right to be free from unreasonable warrantless arrest and search was not clearly established

> at the time plaintiff was arrested and searched. Nor can defendants seriously dispute that plaintiff's right to be free from retaliation for exercise of his free speech rights was not clearly established.

Cert. App. 57. This description of the constitutional right at issue was precisely the sort of overly-generalized description that the Court has repeatedly directed lower courts to avoid. In the seminal case of *Anderson v. Creighton*, the Court held:

> The operation of [the qualified immunity] standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

483 U.S. 635, 639 (1987). *See also Brosseau v. Haugen*, 543 U.S. 194, 200 (2004) (per curiam) (applying

Anderson to reverse denial of qualified immunity based on overly-generalized description of established law, and recharacterizing question more particularly as whether police could "shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."); *Al-Kidd*, 131 S. Ct. at 2084; *Saucier*, 533 U.S. at 201-02.

Here, an appropriately "particularized" description of the legal right at issue is: when a Secret Service agent has some reason to believe that a protester may pose a threat to the Vice President's immediate physical safety and is trying to investigate that potential threat, and the protester refuses to cooperate with this investigation, may the agent arrest the uncooperative protester under 18 U.S.C. § 3056? Petitioners are not asking this Court to hold that a mere refusal to cooperate with a Secret Service investigation is an arrestable offense under § 3056. Rather, petitioners simply note that Howards' refusal to answer questions was one of several factors that led to his arrest, and the scope of a Secret Service agent's authority to arrest on this basis – under the authority of § 3056 – is not clearly established.

When a Secret Service agent is trying to quickly gather enough information to determine whether a suspect poses a potential threat to the President's safety, and the suspect refuses to cooperate with the agent (as Howards chose to do here), the plain language of 18 U.S.C. § 3056 appears to authorize the agent to arrest the uncooperative suspect. Specifically,

the statute directs the Secret Service "to protect" a select group of high ranking executive officials, including the President and Vice President, and their immediate families. 18 U.S.C. § 3056(a)(1) and (7). The statute also makes it an offense to "knowingly and willfully obstruct[ ], resist[ ], or interfere[ ] with a Federal law enforcement agent engaged in the performance of the protective functions authorized by this section. . . ." 18 U.S.C. § 3056(d). Lastly, the statute authorizes Secret Service agents to "make arrests without warrant for any offense against the United States committed in their presence." 18 U.S.C. § 3056(c)(1)(C). Thus, this plain statutory language appears to give Secret Service agents authority to arrest a protester who refuses to cooperate with an agent's legitimate investigation, such as refusing to answer questions that an agent asks in an effort to determine whether the protester poses a threat or not.

Precedents from this Court and the circuit courts confirm that this is not an unreasonable reading of § 3056. The law of ordinary policing recognizes that suspects generally have no obligation to cooperate with police investigations. *E.g.*, *Florida v. Royer*, 460 U.S. 491, 497-98 (1983). Protecting the President, however, is not ordinary policing. *E.g.*, *Galella*, 487 F.2d at 994 n.9 (Secret Service protective function "is *toto coelo* different from the normal police function of arrest for law violation."). And even in ordinary police encounters, potential suspects can be required to at least identify themselves. *See Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177 (2004) (upholding conviction

against Fourth and Fifth Amendment challenge based upon a state statute making it illegal not to identify oneself during a *Terry* stop); *Risbridger v. Connelly*, 275 F.3d 565, 572 (6th Cir. 2002) (person subject to a lawful investigative stop has no clearly established constitutional right not to identify himself).

This expectation that citizens should give police at least a modicum of cooperation with investigations applies most forcefully in the present context, when a Secret Service agent is trying to quickly determine whether a protester poses a threat to a protected official's immediate physical safety. The Court has long recognized that citizens' interests in unfettered exercise of First and Fourth Amendment rights are lowest when the protection of the President or Vice President is at issue. The Court in *Hunter v. Bryant* recognized that Secret Service agents can properly take into account a suspect's refusal to cooperate with an investigation when deciding whether to arrest. 502 U.S. at 225-26 (conferring qualified immunity on Secret Service agents who arrested Bryant in part because Bryant was uncooperative with the agents' investigation, "refused to identify 'Mr. Image' and answered questions about 'Mr. Image' in a rambling fashion."). Likewise, the Court in *Saucier v. Katz* ratified the decision of a military police officer to seize a protestor approaching the Vice President, holding that the officer was entitled to qualified immunity in light of his "duty to protect the safety and security of the Vice President of the United States." 533 U.S. at 209. And in *McCabe v. Parker*, the Eighth Circuit

specifically held that 18 U.S.C. § 3056 authorized Secret Service agents to arrest protesters who had refused to cooperate with a Secret Service agent's directive to move to a different area at a presidential rally, and accordingly recognized that the agents were entitled to qualified immunity from the protesters' subsequent retaliatory arrest claims. 608 F.3d at 1075-78. *See also Stigile v. Clinton*, 110 F.3d 801, 803-04 (D.C. Cir. 1997) (rejecting Fourth Amendment challenge to drug testing by individuals with access to a building within the White House security perimeter based on the nation's overwhelming interest in protecting the President and the Vice President).

Here, Howards was clear in his deposition testimony that he did not cooperate with Agent Reichle's investigation because he felt he had no obligation to answer questions posed by a law enforcement officer. JA 241-42, 247. But this was not an ordinary voluntary encounter with law enforcement. The record in this case confirms that a reason (and perhaps the primary reason) for Agent Reichle's decision to arrest Howards was Howards' refusal to cooperate with Agent Reichle's investigation into whether Howards posed a threat to the Vice President. JA 46 (Reichle deposition testimony).[4]

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[4] Other Secret Service agents involved in the arrest expressed similar concerns that a suspect should not be permitted to ignore questions from a Secret Service agent under such circumstances. JA 145 (Mischloney deposition testimony), 152 (McLaughlin deposition testimony).

Thus, even without considering the agents' probable cause to arrest under 18 U.S.C. § 1001, Howards' refusal to cooperate with Agent Reichle's investigation might have provided a sufficient basis to arrest Howards for violating 18 U.S.C. § 3056.[5] Because no case has specifically addressed and established such a right of non-cooperation, and because the statute and cases like *Hunter* and *McCabe* provide support for arresting such an uncooperative suspect, Agents Reichle and Doyle should be entitled to qualified immunity for arresting Howards on this basis as well.

D. The Complexity of the Tenth Circuit's Analysis Alone Supports Qualified Immunity.

A final reason for determining that the law was not clearly established is the length and complexity of the Tenth Circuit's analysis. The Tenth Circuit panel majority required seven pages of dense legal analysis to ultimately conclude that Tenth Circuit law was clearly settled post-*Hartman*, despite the ongoing circuit split. 634 F.3d at 1143-49; Cert. App. 26-36. But the law of qualified immunity looks to what a

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[5] Because the Tenth Circuit found that the agents had probable cause to arrest Howards under 18 U.S.C. § 1001, it did not consider whether the agents also had probable cause to arrest Howards for violating 18 U.S.C. § 3056 because of Howards' refusal to cooperate with the agents' investigation, or his assault or harassment of the Vice President based on the unsolicited physical contact. Cert.App. 17-18 n.7.

reasonable federal official would understand – it does not require a Secret Service agent to be a legal scholar or expert in constitutional torts. *See Hunter v. Bryant*, 502 U.S. at 229 (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law" – especially where "specter of Presidential assassination is raised"); *McCullough v. Wyandanch Union Free Sch. Dist.*, 187 F.3d 272, 278 (2d Cir. 1999) ("The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct."); *Kompare v. Stein*, 801 F.2d 883, 887 (7th Cir. 1986) ("[A] reasonable person is not expected to act as a legal scholar and predict the future direction of the law.") So even if the Tenth Circuit majority's legal analysis were correct – which it is not – the very length of the discussion and the complexity of the reasoning shows that a pair of Secret Service field agents could not have known it to be "clearly established" Tenth Circuit law.

This is particularly so given how the Tenth Circuit majority's analysis focused on the history and development of the law of retaliatory arrest in the Tenth Circuit. Secret Service agents work across the nation and are trained to a national standard. They should not be expected to be trained on a circuit-by-circuit analysis of the law – particularly where, as here, a given circuit's law requires seven reporter pages to articulate. *See Ashcroft v. Al-Kidd*, 131 S. Ct. at 2086-87 (Kennedy, J., concurring) (discussing the importance of uniform national rules to govern the

conduct of government actors who work throughout the nation); Cert. App. 42 (Kelly, J., concurring in part and dissenting in part, noting that law is clearly established where the Supreme Court has clearly articulated it, but not when one circuit court is able to articulate its particular view of the law amidst competing circuit views).

There are thus four independent and compelling reasons for regarding the law as unsettled, none of which depend on *Hartman*'s probable cause analysis. Any one of these reasons provides a sufficient basis for applying qualified immunity here.

V. A *Bivens* Action for First Amendment Retaliation Has Never Been Recognized.

One final reason to reverse the underlying decision, brought to the fore by this Court's decision earlier this term in *Minneci v. Pollard*, No. 10-1104 (Jan. 10, 2012), is that this Court has never extended *Bivens* to a claim for First Amendment retaliatory arrest.

In *Bivens*, the Court recognized a claim directly under the Fourth Amendment for an improper search by FBI agents. *Bivens*, 403 U.S. at 389. In the years since, the Court has applied *Bivens* to only two other types of claims, recognizing a damages action implicit in the Fifth Amendment's Due Process Clause, *see Davis v. Passman*, 442 U.S. 228 (1979), and in the Eighth Amendment, *see Carlson v. Green*, 446 U.S. 14 (1980). Not only has the Court avoided any other direct extensions of *Bivens*, but it has expressed a clear

disinclination to do so, stating in *Ashcroft v. Iqbal* that "[b]ecause implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability 'to any new context or new category of defendants.'" 556 U.S. 662, 129 S. Ct. 1937, 1948 (2009) (quoting *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).[6]

Earlier this term, this Court again declined to extend *Bivens* in *Minneci v. Pollard*. The Court in *Minneci* applied the two-part test developed by the Court in *Wilkie v. Robbins*, 551 U.S. 537 (2007), for determining whether to recognize a *Bivens* remedy. Under the *Wilkie* test, a court first looks at whether the plaintiff has any alternative, adequate existing remedy. Second, "even in the absence of an alternative, a *Bivens* remedy is a subject of judgment: 'the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation.'" *Wilkie*, 551 U.S. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

In the instant action, Howards' claim would extend *Bivens* to a new context: First Amendment retaliatory arrest. This Court's hesitancy to extend

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[6] *Hartman v. Moore* was postured as a *Bivens* claim, but the Court effectively terminated that claim based on its probable cause analysis, without expressly discussing whether *Bivens* actions should be cognizable for First Amendment retaliation.

Bivens, and the two-part *Wilkie* test, both counsel against any such extension here. Even if Howards lacks another forum for adjudicating his claim, the second *Wilkie* factor is plainly applicable. As discussed *supra*, subjecting Agents Reichle and Doyle to trial exposure and potential financial liability presents policy risks, not the least of which would be impeding the agents' need to be able to make split-second determinations, often based upon political speech, in furtherance of their job to protect the President and Vice President. *See, e.g.*, *Crawford-El v. Britton*, 523 U.S. at 590 (noting the "strong public interest in protecting public officials from the costs associated with the defense of damages actions" and recognizing that this "interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated"). At a minimum, the presence of probable cause should bar Howards' *Bivens* claim, just as it did in *Hartman v. Moore*.

CONCLUSION

For the reasons set forth above, the Court should reverse the decision of the Tenth Circuit, hold that petitioners are entitled to qualified immunity from

respondent Howards' retaliatory arrest claim, and direct the lower courts to enter summary judgment for petitioners.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 11-262

In The
Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR.,
DAN DOYLE,

Petitioners,

v.

STEVEN HOWARDS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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STATEMENT OF THE CASE

I. Decision Below and Facts.[1]

Petitioners grossly abused the extraordinary powers granted them as Secret Service Agents by arresting Respondent Steven Howards in retaliation for his constitutionally protected speech on issues of national concern. The unconstitutional arrest involved no dire emergencies, no split-second decision making and no threat to the Vice President, then under Secret Service protection.[2] By their own testimony, after this unconstitutional arrest, Petitioners engaged in a cover-up and ended up accusing each other and their colleagues of having committed multiple federal crimes in conjunction with this case.[3]

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[1] Generally, Respondent agrees with Petitioners' rendition of the facts, save for these important additions.

[2] Petitioners and *Amicus* United States speak of agents making "split-second judgments in highly charged environments." (*Amicus* Br. of United States 8.) Petitioners continue by stating that agents must "make immediate, potentially life-or-death decisions whether to arrest individuals in order to protect the physical safety of the President and other leaders." (Pet'rs Br. 11-12.) They argue that affirmance by this Court could cause an Agent to hesitate to act, while also stating that "[o]f course, Secret Service agents will never consciously allow their critical protective duties to be compromised by fear of potential legal liability." (Pet'rs Br. 11-12, 31.)

[3] These incredible allegations were outlined in a front-page story in the New York Times, January 18, 2008. *See* Kirk Johnson, *2006 incident involving Cheney leads to internal strife in Secret Service*, N.Y. Times, Jan. 18, 2008, at A1. (*See also* http://www.nytimes.com/2008/01/18/world/americas/18iht-18colorado.9327408.

(Continued on following page)

Special Agent Mike Lee, the Agent in charge of the protective detail, was standing within eight inches of the Vice President when this encounter occurred. (JA 368.) He overheard the verbal exchange and saw the entire incident, yet made no move to detain Howards. He testified that he observed no crime being committed (JA 360, 365), he perceived no threat posed to the Vice President (JA 362, 375)and he had no probable cause to arrest Howards. (JA 371.) Special Agent Adam Daniels witnessed the incident and agreed that there was no probable cause to believe any crime had occurred. (JA 417.) Nevertheless, Petitioners arrested Howards, seeking to charge him with assaulting the Vice President. (JA 60.)

After Howards was arrested, Agent Daniels testified that he was present when Agent McLaughlin got a call from Agent Reichle. McLaughlin related to Daniels that Reichle had asked them to change their testimony and reports to match his own. (JA 351, 427.) Shocked at this request, McLaughlin would not discuss the incident with Reichle and actually hung up on him. (JA 289.) McLaughlin was also an eyewitness who saw no probable cause to arrest Howards. (JA 344.) Reichle has accused McLaughlin and the "protective detail" of being engaged in a "cover-up." (JA 352.) When Reichle made this accusation the morning after the arrest, McLaughlin believed Reichle had "taken a giant leap away from his good senses." (JA 352.) McLaughlin believed that Reichle,

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html?scp=3&sq=%22David%20Lane%22%20and%20%22Secret%20Service%22&st=cse (last visited February 17, 2012).

in requesting that he falsify his reports and change his story, was asking him to commit several federal crimes. (JA 352-53.) Reichle, on the other hand, believed that McLaughlin and Daniels were lying under oath, filing false reports and covering up a crime. Reichle went so far as to ask his supervisor to polygraph his fellow agents. (JA 282.) According to Reichle, his supervisor continued the cover-up by saying, "Don't go there Gus." (JA 282.) Reichle thought that his superior believed that "putting Agents on the box" (polygraph), would "stir up a hornet's nest." (JA 301.) Reichle testified that McLaughlin told him he had been ordered not to talk about this incident or cooperate with Reichle. (JA 285.) Reichle has subsequently been transferred to Guam and stated that he did not make the decision not to file federal charges. (JA 308, 317.)

II. Analysis Below.

The Tenth Circuit determined that because Howards had lied to the Secret Service, probable cause existed to charge him with violating 18 U.S.C. § 1001, making a false statement to a federal investigator.[4] Based upon this fact, the court below

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[4] This was hotly contested at oral argument in the court below. Undersigned counsel argued that there was no materiality to Howards' telling the Agent that he had not touched the Vice President as the misstatement was in context of an assault and, further, there is nothing illegal about touching the Vice President. Indeed, numerous people were shaking his hand and touching him on the mall in Beaver Creek on that day. The

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dismissed Howards' Fourth Amendment claim. Despite this finding of probable cause, however, the court below has permitted Howards to continue his First Amendment retaliatory arrest claim on the grounds that he has presented credible evidence that the actual motives of the defendants in arresting him were to punish him for his protected speech.

The court below acknowledged that there is a split in the circuits on this issue, and took care in distinguishing this Court's holding in *Hartman v. Moore*, 547 U.S. 250 (2006), involving a retaliatory *prosecution* case wherein this Court determined that the absence of probable cause in that circumstance necessarily must be proved in order to sustain a First Amendment retaliatory *prosecution* lawsuit, from the present case involving a retaliatory *arrest*.

The essential holding of the court below was:

> Even if an official's action would be "unexceptionable if taken on other grounds," when retaliation against constitutionally-protected speech is the but-for cause of that action, this retaliation is actionable and "subject to recovery." *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (*citing Crawford-El v. Britton*, 523 U.S. 574, 593 (1998); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977)); *see also DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("An act taken in retaliation

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district court's order permitted a trial on the Fourth Amendment issue as well as the First Amendment issue. (Pet. App. 46-61.)

> for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." (internal quotation marks omitted)); *cf. Whren v. United States*, 517 U.S. 806, 813 (1996) (explaining that although the constitutionality of a seizure under the Fourth Amendment does not depend on the motivations of the officers involved, "selective enforcement of the law based on considerations such as race" violates the Equal Protection Clause). "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'" *Hartman*, 547 U.S. at 256 (*quoting Crawford-El*, 523 U.S. at 588 n.10) (alteration in original). Moreover, "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Id.*; *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (noting government may not punish a person or deprive him of a benefit due to his "constitutionally protected speech").

(Pet. App. 22-23.)

The court below refused to extend *Hartman* to the case presently before this Court. The Tenth Circuit distinguished the present situation involving a retaliatory *arrest* from that confronting this Court in *Hartman*, involving a retaliatory *prosecution*, by noting that "[u]nlike the plaintiff in *Hartman*, Mr. Howards does not attack prosecutorial discretion

based on the bad motive of a third person." (*Id.* at 32.) Because the arresting agents were the retaliating officers, this case involved "the quintessential 'ordinary retaliation claim' as outlined in *Hartman* – a claim in which the agent allegedly harboring the unconstitutional animus is the same individual who carries out the adverse action. *Hartman*, 547 U.S. at 259-60." (*Id.* at 32-33.) The court below also noted that "unlike prosecutors, Secret Service Agents enjoy no presumption of regularity regarding their decision-making." (*Id.* at 33.) Given these distinctions, the Tenth Circuit was "not persuaded *Hartman* applies to the circumstances here."[5] (*Id.*)

The court below went on to hold that because *Hartman* "did not disturb our earlier precedent on ordinary retaliation cases, when Howards was arrested it was clearly established that an arrest made in retaliation of an individual's First Amendment right is unlawful, even if the arrest is supported by probable cause." (*Id.* at 34.) The court below denied qualified immunity and permitted "Howards to proceed with his First Amendment retaliation claim notwithstanding probable cause existed for his arrest." (*Id.* at 34-35.)

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[5] The court below cited to John Koerner, Note, *Between Healthy and Hartman: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 771 (2009) ("[T]he Court did not signal that it was rejecting [the *Mt. Healthy*] standard in general. Instead, the Court stressed three factors that supported a heightened pleading standard in retaliatory prosecution cases: complex causation, evidentiary concerns, and the presumption of prosecutorial regularity."). (Pet. App. 33.)

SUMMARY OF THE ARGUMENT

I. A Lack of Probable Cause Should Not be an Element of a First Amendment Retaliatory Arrest Lawsuit.

A First Amendment retaliatory arrest suit should lie regardless of whether the arresting officer possessed probable cause to make an arrest when that officer was actually motivated by personal animus toward the protected speech. Put another way, it must remain the law of the land that "[e]ven if an official's action would be 'unexceptionable if taken on other grounds,' when retaliation against Constitutionally-protected speech is the but-for cause of that action, this retaliation is actionable and 'subject to recovery.'" (*Id.* at 22 (quoting *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (citing *Crawford-El v. Britton*, 523 U.S. 574 (1998); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977)).)

II. The Doctrine of Qualified Immunity Provides Adequate Protection for the Secret Service Agents in this Case and it Should Neither be Converted into Absolute Immunity Generally nor Should Qualified Immunity Shield the Agents in this Case.

Hartman did not suddenly cast doubt on whether the law is clearly established that a retaliatory prosecution is unlawful. It was a decision made by this Court to engraft a Fourth Amendment element onto a First Amendment retaliatory prosecution case due to

the unique nature of the decision-making process involved in launching a prosecution, and in order to obtain damages, a plaintiff must plead and prove an absence of probable cause. Contrary to Petitioners' argument, the presence of probable cause does not legalize a retaliatory prosecution. Similarly, it is equally clearly established that retaliatory arrests are unlawful with or without probable cause. The only issue before this Court is whether similar considerations in the context of a retaliatory arrest will dictate the same result. As a general proposition, the doctrine of qualified immunity adequately protects Petitioners and familiar, well-settled principles of law should be applied to the analysis in this case.

ARGUMENT

I. *Hartman* Should Not be Extended.

A. Holding in *Hartman*.

This Court's essential holding in *Hartman* is quite clear: In complex causation cases involving multiple and remote actors resulting in a criminal prosecution allegedly in retaliation for protected speech, a plaintiff must plead and prove an absence of probable cause in order to proceed on a First Amendment retaliatory prosecution theory.

The Tenth Circuit as well as this Court carefully distinguished between the "complex" causation chain inherent in a retaliatory prosecution case versus that of "'ordinary retaliation claims, where the

government agent allegedly harboring the animus is also the individual allegedly taking the adverse action.'" (Pet. App. 30 (quoting *Hartman*, 547 U.S. at 259).) This, coupled with the fact that there is a "long-standing presumption of regularity accorded to prosecutorial decision-making," *Hartman*, 547 U.S. at 263, which this Court does "not lightly discard," *id.*, caused this Court to conclude that absent a finding of no probable cause, a retaliatory prosecution case could not proceed.

Given the convoluted, complex causation chain necessary to proceed with a malicious prosecution-type of retaliation claim, this Court held that once probable cause has been found, the inquiry into the subjective motives of distant actors who may have played a role in motivating the prosecution is too attenuated from the myriad reasons for the decision made by a prosecutor to prosecute, thus foreclosing a retaliatory prosecution suit.

B. Split in the Circuits.

Whether *Hartman* should be extended to retaliatory arrest cases has engendered a split in the circuits. However, each circuit that has unilaterally extended *Hartman* into the retaliatory arrest arena has done so without undertaking the rigorous analysis of the court below. Generally where *Hartman* has been extended, there has been no effort made to

distinguish retaliatory prosecution cases from those alleging a retaliatory arrest.[6]

In addition to the Ninth and Tenth Circuits' refusal to extend *Hartman*, more recently, the D.C. Circuit stated in *Moore v. Hartman*, 644 F.3d 415, 424 (D.C. Cir. 2011),[7] that there is "nothing about the First Amendment's right to free speech . . . [that] suggests any connection between the right and criminal 'probable cause.'"

The Ninth, Tenth and D.C. Circuits looked to the core of *Hartman* in determining its breadth. They correctly recognize that *Hartman* hinges on causation. In simple causation cases where the arresting officer with probable cause was actually motivated by personal animus based upon protected speech, and that officer caused plaintiff's injury with no intervening party complicating causation, the "ordinary

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[6] These decisions *sub silentio* have adopted Justice Scalia's dissent in *Crawford-El v. Britton*, 523 U.S. 574, 612 (1998) (Scalia, J., dissenting), arguing that, "once the trial court finds that the asserted grounds for the official action were objectively valid (*e.g.*, the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (*e.g.*, the incompetent person fired was a Republican)." This dissent is premised upon the idea that Section 1983 has been stretched beyond recognition by this Court. The majority of this Court rejected Justice Scalia's "objective test" as "unprecedented." *Id.* at 594.

[7] This case is *Hartman* on remand from this Court with a *cert.* petition currently pending. No. 11-836. (*Amicus* Br. of William Moore 18.)

retaliation" framework applies. *Hartman*, 547 U.S. at 259. The absence of probable cause is not necessary to "bridge the gap" in divining causation. *Id.* at 263. Instead, it is left to play a role of "powerful evidentiary significance." *Id.* at 261.

With virtually no analysis, two circuits have extended *Hartman*'s no-probable-cause requirement to retaliatory arrests and two have left undisturbed their pre-*Hartman* cases requiring the same. The two circuits that have extended *Hartman* to retaliatory arrest have done so in cases of complex causation. Neither case supports the extension of *Hartman* to this "quintessential 'ordinary retaliation claim,'" where no intervener complicates causation. (Pet. App. 32.)

In *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006), the Sixth Circuit's first case extending *Hartman*, the court only observed, summarily, that:

> *Hartman* appears to acknowledge that its rule sweeps broadly; the Court noted that causation in retaliatory-prosecution cases is "*usually* more complex than it is in other retaliation cases." [*Hartman*, 547 U.S. 250] at 1704 (emphasis added). Regardless of the reasoning, it is clear that the *Hartman* rule . . . applies in this case.

Id. at 720.

The Sixth Circuit has been inconsistent in extending *Hartman*. *See Kennedy v. City of Villa Hills*, 635 F.3d 210, 217 n.4 (6th Cir. 2011) ("The Sixth

Circuit has not decided whether the lack of probable cause is an element in wrongful-arrest claims after the Supreme Court's ruling in *Hartman v. Moore*."). *But see Everson v. Calhoun Cnty.*, 407 F. App'x 885, 888 (6th Cir. 2011) (holding that whether probable cause existed was a jury question).

The Eighth Circuit has extended *Hartman* to retaliatory arrest claims, but its reasoning is equally unpersuasive. *Williams v. City of Carl Junction*, 480 F.3d 871 (8th Cir. 2007), merely adopted *Barnes* wholesale in a case of complex causation.

The Eleventh and Second Circuits have left undisturbed their pre-*Hartman* holdings that the absence of probable cause is an element of any retaliatory arrest claim. Neither Circuit has applied *Hartman* by analyzing causation and prosecutorial presumptions. Both Circuits are best characterized as having a pre-*Hartman* no-probable-cause requirement for retaliatory arrest claims, and an undeveloped post-*Hartman* precedent.

While there is a split in the circuits, the "split" is largely one of outcome and not analysis. In sum, the inter-circuit conflict identified by Petitioners exists, but only superficially. The cases requiring probable cause as an element of retaliatory arrest claims do not persuasively argue for resolution in their favor. This Court should resolve the split by recognizing the distinctions noted in *Hartman* between retaliatory prosecution and retaliatory arrest claims.

C. The *Mt. Healthy* Test Is the Appropriate Standard for Determining a First Amendment Retaliatory Arrest Claim.

The historical approach taken by the court below is entirely consistent with this Court's decisions in First Amendment retaliation cases. Over thirty years ago in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court set forth the proper test for determining whether a plaintiff may prevail on a First Amendment retaliation claim. A plaintiff must show that he or she was engaged in protected speech and the defendant's conduct was substantially motivated by retaliation for plaintiff's exercise of First Amendment rights. The burden then shifts to the defendant to prove that the same action would have been undertaken "even in the absence of the protected conduct." *Id.* at 287.

The *Mt. Healthy* test has proven to be a workable test for more than three decades. While theoretically, every person arrested could allege a retaliatory arrest for protected speech, only a tiny fraction of those arrested ever raise such an allegation.[8] Petitioners do not attempt to mount a "floodgates" argument as

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[8] Using the LEXIS search terms "'first amendment' /s retaliat! /s arrest /s (1983 or bivens)" with no time restriction, 15 substantive decisions involving retaliatory arrests were reported in all federal appellate courts. *See also Hartman*, 547 U.S. at 258-59, finding no need to "screen out" retaliation claims based on concern of "volume of litigation" given the relative paucity of such claims to date.

none can legitimately be raised. History has vindicated the *Mt. Healthy* test and it has functioned precisely as it was intended.[9]

It is only at the narrow margin where the arresting officer's broad discretion regarding whether or not to arrest in any given situation collides with provocative speech that the issues presented here commonly arise. It is difficult to conceive of a case wherein a convicted felon could successfully prosecute a retaliatory arrest claim and prove that but for the protected speech, he would not have been arrested for a felony. Rather, such cases arise almost exclusively in the context of petty offenses where flimsy probable cause to arrest confronts actual subjective unconstitutional motivations, which lead to civil rights lawsuits.

While Petitioners complain about the burden litigation imposes upon them (Pet'rs Br. 40), this Court should not erect additional hurdles for plaintiffs in order to accommodate Petitioners' concern that they not be bothered defending many meritorious lawsuits which interfere with their executive powers. As Justice Kennedy powerfully commented in his concurring opinion in *Crawford*, "We must guard against disdain for the judicial system. As Madison reminds us, if the Constitution is to endure, it must

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[9] "'[I]f it ain't broke, don't fix it.'" *United States v. Natanel*, 938 F.2d 302, 310 (1st Cir. 1991); *Denmark v. Liberty Life Assur. Co.*, 481 F.3d 16, 40 (1st Cir. 2007) (quoting *Natanel*, 938 F.2d at 310).

from age to age retain 'the veneration which time bestows.'" *Crawford-El v. Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring) (quoting THE FEDERALIST NO. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961)).

D. Impact of Extending *Hartman* to Retaliatory Arrests.

It is not difficult to imagine the societal impact of this Court extending *Hartman*. This Court has vindicated the unfettered exercise of First Amendment protected speech over decades in many extremely controversial cases. Flag burning is political speech. *United States v. Eichman*, 496 U.S. 310, 315, 318-19 (1990). If *Hartman* is extended, it is easy to imagine a rarely-or-never enforced prohibition on open fires resulting in the arrest of a flag-burner by an enraged officer whose sole motive is to stop the protected conduct. This Court has held that virulent ethnic and religious epithets are protected speech. *Terminiello v. Chicago*, 337 U.S. 1, 3-4 (1949). If an officer is motivated to arrest based upon the content of the speech, the unconstitutional arrest should not be excused simply because the speaker momentarily steps off the sidewalk and is thereby jay-walking. This Court has upheld vulgar repudiations of government policies. *Cohen v. California*, 403 U.S. 15, 26 (1971). If a protestor were to symbolically rip up a copy of legislation and throw it into the wind, with an assist from *Hartman* a littering arrest would cause this Court to turn its back to the fact that the officer was motivated

by animus toward the speech. This Court has protected scurrilous caricatures of prominent people. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). If a protestor posts offensive drawings on a telephone pole in violation of a municipal ordinance prohibiting posting bills and an offended officer is merely looking for any excuse to make an arrest, this Court should not simply blind itself to the violation of the First Amendment. This Court has permitted horrific speech that offends virtually all rational people in the context of protests at military funerals. *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011). If *Hartman* is extended, however, protestors need be mindful not to briefly put down a sign or a bottle of water on the sidewalk thereby violating rules on blocking sidewalks or an outraged officer has a green light to make an arrest. Conceivable probable cause cannot justify a demonstrable First Amendment violation.

If this Court extends *Hartman* as Petitioners urge, the basic vitality of the First Amendment will be "bureaucratized" into irrelevancy, as it will consistently be trumped by the pettiest of offenses. It will embolden and encourage rogue officers seeking to punish protected speech to search for any legal justification in support of a *post hoc* judicial finding of probable cause to support the suppression of our most fundamental freedom. The violation of an almost-never-enforced petty ordinance if bolstered by the new-and-improved "Super Fourth Amendment" will be sufficient to render meaningless the First and Fourteenth Amendments. If *Hartman* is extended,

there would be no logical reason to permit any other constitutional claim to proceed when confronted with a petty violation of the law supported by probable cause. Logically there is no significant distinction between a First Amendment retaliatory arrest suit and an Equal Protection suit against a racist officer who, while possessing probable cause for a seat belt violation arrests only African-American traffic violators while ignoring all other violators. If one is foreclosed, both should be. The point is that neither claim should yield simply because the Fourth Amendment happened to not be violated.

If Petitioners prevail and *Hartman* is extended to on-street encounters between political protestors and the police, the "'bedrock principle underlying the First Amendment . . . that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,'" *Eichman*, 496 U.S. at 318-19 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)), will be severely crippled. Gone will be the notion expressed so eloquently by Justice Holmes that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), *overruled on other grounds by Girouard v. United States*, 328 U.S. 61 (1946). Instead, our most precious right to free speech, "the matrix, the indispensable condition, of

nearly every other form of freedom," *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969), will be hostage to the unlawful motives of officers on the beat ostensibly enforcing the plethora of rules, regulations, statutes and ordinances permeating our society.[10] "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). As Americans, the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This is so because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted); *see also Snyder*, 131 S. Ct. at 1215. Any form of retaliation for protected speech is simply intolerable. "[T]he First Amendment . . . protects . . . from even an act of retaliation as trivial as failing to hold a

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[10] "Bureaucracy, the rule of no one, has become the modern form of despotism." Mary McCarthy, *The Vita Activa*, THE NEW YORKER (Oct. 18 1958).

birthday party for a public employee . . . when intended to punish her for exercising her free speech rights." *Rutan v. Republican Party*, 497 U.S. 62, 76 n.8 (1990) (internal quotation marks omitted).

To extend *Hartman* is to make the Fourth Amendment a "Super Amendment" trumping all other constitutional protections. There is no theory of constitutional jurisprudence, or logic, where the mere existence of probable cause to arrest under the Fourth Amendment for the most minor offense eradicates and supplants any and all other constitutional rights. The mere fact that an officer *could* have arrested someone for the commission of a petty offense, but actually *did* arrest someone in retaliation for protected speech should not result in this Court abandoning its illustrious history of protecting the First Amendment. Neither Steven Howards nor any other citizen should pay with their freedom for having criticized any public official and be left with no legal recourse for this assault on the Constitution.

E. Pervasive Police Discretion in Arresting Would Severely Undermine the First Amendment if *Hartman* Is Extended.

The police have virtually unfettered discretion to arrest or not arrest once probable cause is determined. Under Petitioners' theory, because probable

cause is so readily found[11] for the most minor offenses, the vitality of the First Amendment will be inexorably linked to the most mundane petty offenses. It is simply true that "the power to be lenient [also] is the power to discriminate." *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (internal quotation marks omitted). It is equally true that:

> under our democratic system of government, lawmaking is not entrusted to the moment-to-moment judgment of the policeman on his beat. . . . To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than of laws. There are ample ways to protect the domestic tranquility without subjecting First Amendment freedoms to such a clumsy and unwieldy weapon.

Gregory v. Chicago, 394 U.S. 111, 120-21 (1969) (internal citation omitted).

If *Hartman* is extended, each of this Court's precedents outlined *supra* could be circumvented simply through the discriminatory enforcement of

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[11] "'By statute the power of peace officers to arrest without a warrant is often extended to all misdemeanors committed in their presence. Such a statute is constitutional.'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 344 (2001) (quoting J. Beale, *Criminal Pleading and Practice* § 21, p. 20, and n.7 (1899)).). "[Probable cause could be found to] indict a 'ham sandwich.'" *United States v. Navarro-Vargas*, 408 F.3d 1184, 1195 (9th Cir. 2005) (citation omitted).

petty offenses, and the First Amendment as we know it will wither. "[I]t would permit unethical officers to target their enemies or critics with a litany of citations for petty violations that would be ignored if committed by anyone else. Mark A. Edwards, *Law and the Parameters of Acceptable Deviance*, 97 J. CRIM. L. & CRIMINOLOGY 49, 87 (Fall 2006) (arguing that risk of selective enforcement is greatest when conduct is 'formally illegal' but within zone of 'acceptable deviance,' such as [minor driving infractions])." *Gullick v. Ott*, 517 F. Supp. 2d 1063, 1069-70 (W.D. Wis. 2007).

It can be said with virtually complete certainty that almost every driver will violate some traffic ordinance on the way home this evening, perhaps including members of this Court.[12] Under *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), incarceration for driving one mile-per-hour over the speed limit would be legal. Under *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), 48 hours in the county jail with no probable cause determination and no bond set is permitted. Historically, those who espouse unpopular views are frequently the targets of police retaliation. If a police officer did this to any member of this Court in retaliation for an opinion with which the officer disagreed, under Petitioners'

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[12] "Everyone violates some aspect of the traffic code in some way during any short drive." David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, LAW & CONTEMP. PROBS., 71, 95 (Summer 2003).

scheme, there would be no recourse of any kind for this egregious First Amendment violation.[13] "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987). In this Orwellian vision of America, the only people who would thrive in a police state are the police.

If the mere presence of probable cause actually triggered arrests in this country, virtually no one would remain unincarcerated. It is for this reason that this Court has consistently upheld the use of discretion by the police in law enforcement. In *Atwater*, where Petitioner was arrested for a seat belt violation, this Court held that the police may exercise "judgment in choosing between the discretionary leniency of a summons in place of a clearly lawful arrest." 532 U.S. at 350. Lower courts have echoed this sound finding.[14] Numerous commentators have

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[13] Newt Gingrich calls for the arrest of "activist" judges. Sam Stein, *Gingrich Says He Would Arrest Judges With Capitol Police Or U.S. Marshals*, HUFFINGTON POST, Dec. 18, 2011, http://www.huffingtonpost.com/2011/12/18/gingrich-judges_n_1156405.html (last visited Feb. 4, 2012).

[14] *John v. City of El Monte*, 515 F.3d 936, 940 (9th Cir. 2007) ("[An] officer's subjective intention in exercising his discretion to arrest is immaterial in judging whether his actions were reasonable for Fourth Amendment purposes."); *see also Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148 (D.C. Cir. 2004); *Hughes v. City of Guntown*, No. 1:04CV386-D-D, 2006 U.S. Dist. LEXIS 99287 (N.D. Miss. Mar. 23, 2006).

long noted the indispensible nature of police discretion in law enforcement.[15] *Town of Castle Rock v. Gonzales,* 545 U.S. 748, 760-61 (2005), held that even a "mandatory arrest" statute was not truly mandatory. The police retain virtually unbridled discretion to arrest or refrain from arresting. As Justice Scalia opined for the *Gonzales* majority, there exists a "well established tradition of police discretion," and

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[15] JAMES Q. WILSON, VARIETIES OF POLICE BEHAVIOR 31 (1968); *see* Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 710 (1967); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 7 (2004) (noting that in disorderly conduct situations, "arrests were not the primary means used by police officers to 'keep the peace' "); Brandt J. Goldstein, *Panhandlers at Yale: A Case Study in the Limits of Law*, 27 IND. L. REV. 295, 337, 337-41, 350 (1993) (finding police generally refrain from using arrests when other means for controlling panhandler activity are available); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 589 (1997) (noting arrest can actually interfere with officer's primary goal of maintaining order because it takes officer off beat for a time); *see also Martin v. Malhoyt*, 830 F.2d 237, 268 (D.C. Cir. 1987) ("[E]veryday experience suggests that officers do (and should) limit themselves to a warning in many instances of relatively technical violations."). Allowing a victim to play a role in deciding whether or not the offender will be arrested can empower the victim and may reduce the incidence of future crime. *See* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention,* 113 HARV. L. REV. 550, 565-70 (1999) (arguing that mandatory arrest statutes disempower victims of domestic violence and lead to increased abuse). The criminal justice system relies heavily on criminal informants. *See* Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 564 (1999) (arguing that current use of informant information is excessive).

this flows from the "deep-rooted nature of law-enforcement discretion." *Id.* It is, the Court proclaimed, simply "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances." *Id.* at 761 (internal quotation marks omitted). As Justice Scalia aptly pointed out, in the minds of some officers there are some ordinances and violations that are simply "too insignificant to pursue." *Id.* at 761 n.8.

As important as police discretion is, unfettered bureaucratic or police discretion in context of enforcing the First Amendment is intolerable. In *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988), this Court overturned a flawed statute that gave a town mayor discretion to determine which newspapers could be placed on racks on city property and which could not. This Court had no trouble in holding that "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* Similarly, in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992), this Court struck down as over-broad an ordinance allowing for content-based discrimination in the awarding of parade permits. In *Leathers v. Medlock*, 499 U.S. 439, 458 (1991), this Court condemned the risk of governmental abuse in the form of "covert censorship," where some media were favored over others. This Court held that "the 'power to tax'

does *not* include 'the power to discriminate' when the press is involved." *Id.* at 464.

Given that probable cause for the most minor violation can readily be found, it is a frightening prospect to contemplate our most essential freedom – freedom to speak – being subsumed and eliminated simply through the ostensible "enforcing" of the pettiest of ordinances.

It is well established that an act that is lawful under the Fourth Amendment, or some other constitutional provision, may still violate other provisions of the Constitution. In *Whren v. United States*, 517 U.S. 806, 809 (1996), this Court held that a traffic stop supported by probable cause would not violate the Fourth Amendment regardless of the subjective motive of the officer for the stop. The two African-American defendants in *Whren* conceded that the police had probable cause to believe that they had violated local traffic laws, but argued the traffic stop nonetheless should be held unreasonable under the Fourth Amendment, because the stop was pretextual and no reasonable officer would have stopped them for those traffic violations. *Id.* at 810. This Court held "[s]ubjective intentions [of police] play no role in ordinary, probable-cause Fourth Amendment analysis" therefore the traffic stop did not violate the Fourth Amendment. *Id.* at 813. This Court pointedly noted, however, that "the Constitution prohibits selective enforcement of the law based on considerations such as race," and as such, "the constitutional basis for objecting to intentionally discriminatory

application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.*

The *Whren* analysis has been applied countless times. As the court below held, "[a] reasonable search and seizure is thus not inoculated against all constitutional scrutiny. Significantly, *Hartman* did not overrule *Whren*, nor did it undermine this important principle." (Pet. App. 35.)

There is no principled distinction to be made between the *Whren* analysis bifurcating Fourth and Fourteenth Amendment claims and the decision below in this case bifurcating Fourth and First Amendment claims. "If probable cause acts as an absolute bar for any retaliation claim against a police officer, this would provide immunity for even the most egregious examples of selective enforcement." *Gullick*, 517 F. Supp. 2d at 1069. This Court has long held that a statute valid on its face is no longer valid if it is enforced in a discriminatory fashion. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Consistent with long-standing principles affirmed by this Court, an official should not be able to "take refuge in a pretextual justification that in fact had nothing to with his actions." *Gullick*, 517 F. Supp. 2d at 1069.

The cases applying *Whren* provide a framework for holding here that the existence of probable cause does not preclude Respondent's First Amendment retaliatory arrest claim. Wrongful and retaliatory arrests are, and must be, separately analyzed constitutional causes of action. Assuming probable cause,

"if the plaintiffs can show that they were subjected to unequal treatment based upon their race or ethnicity [or protected speech] during the course of an otherwise lawful traffic stop, that would be sufficient to demonstrate a violation of the Equal Protection Clause [or the First Amendment]." *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 533 (6th Cir. 2002). Just as "the Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures," *id.* (internal quotation marks omitted), so too, must the First Amendment. Because they arise from different constitutional provisions, the analysis of a First Amendment retaliation claim must be "wholly separate" from any Fourth Amendment probable cause inquiry. *Carrasca v. Pomeroy*, 313 F.3d 828, 836 (3d Cir. 2002) (declining to credit district court's dismissal of discriminatory enforcement Equal Protection Claim based solely on finding of probable cause for arrest). "'The fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected' for enforcement of a law." *Id.* (quoting *Bradley v. United States*, 299 F.3d 197, 205 (3d Cir. 2002)).

Logically, this analysis makes perfect sense. It is a *non-sequitur* to hinge the violation of one constitutional right on the enforcement of another. Simply because an official's action would be "unexceptionable if taken on other grounds," when retaliation against constitutionally-protected speech is the but-for cause

of that action, this retaliation is actionable and "subject to recovery." *Hartman*, 547 U.S. at 256 (citing *Crawford-El*, 523 U.S. at 574; *Mt. Healthy*, 429 U.S. at 283-84).

This Court has historically ensured that citizens retain *all* of their constitutional rights. In the context of a criminal case this Court has held that "it [is] intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968). Absent some sort of mutual exclusivity,[16] however, no one may be forced to abandon a fundamental constitutional right. *See, e.g. United States v. Jackson*, 390 U.S. 570, 572 (1968) (holding that it is unconstitutional to punish a defendant for the exercise of the right to a jury trial).

In innumerable contexts this Court has analyzed ostensibly legal actions undertaken by both public and private parties and examined the actual intent of the actor in order to determine whether a constitutional violation has occurred.[17] In *Wilkie v. Robbins*,

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[16] For example, a criminal defendant cannot simultaneously exercise the constitutional right to both testify and remain silent at a trial.

[17] In *Waters v. Churchill*, 511 U.S. 661, 690-91 (1994) (Scalia, J., concurring) Justice Scalia cited the following examples: "*See, e.g. Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 484 (1992) (antitrust laws); *Hernandez v. New York*, 500 U.S. 352, 363-364 (1991) (plurality opinion) (constitutionality of peremptory challenges); *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-188 (1989) (employment discrimination suit

(Continued on following page)

551 U.S. 537 (2007), this Court held that "we have established methods for identifying the presence of an illicit reason (in competition with others), not only in retaliation cases but on claims of discrimination based on race or other characteristics." *Id.* at 556 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). Determining the intent of defendants in both criminal and civil cases occurs daily in thousands of courtrooms across the land. It is a fundamental function of the Anglo-American justice system and has been successfully undertaken by courts and juries for hundreds of years.

Clearly, an employee-at-will can legally be fired for any reason at all. Virtually every Title VII case, however involves an examination of the employer's *actual* reasons for terminating the employee. It has never been the law that it is permissible to single out for firing an employee *because* that employee is a Republican or a member of a protected class (even if

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under 42 U.S.C. § 1981); *New York v. Burger*, 482 U.S. 691, 716-717, n.27 (1987) (Fourth Amendment challenge to administrative searches); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 895-896, n.6 (1984) (unfair labor practice suit under the National Labor Relations Act); *Geduldig v. Aiello*, 417 U.S. 484, 496-497, n.20 (1974) (Equal Protection Clause sex-discrimination claim against legislation); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973) (discrimination claim under Title VII)." In First Amendment contexts this Court has similarly examined pretext. *See, e.g. Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (holding that zoning laws restricting the location of movie theaters do not violate the First Amendment unless they are a pretext for preventing free speech).

the fired employee was actually incompetent). Whether or not a termination is legal ultimately depends solely upon the actual intent of the actor.[18]

In a free society the vitality of the First Amendment cannot be dependent upon whether or not an arresting officer determines that the pettiest municipal ordinance has been violated. While Petitioners argue that law enforcement officers need "breathing room" to make discretionary decisions (Pet'rs Br. 11), this Court has repeatedly held that it is the "First Amendment freedoms [that] need breathing space to survive." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468-69 (2007) (quoting *Button*, 371 U.S. at 433). Simply put, a free society cannot tolerate incursions into free speech simply because a law enforcement officer happens to be offended by the speech and has a readily available excuse to make an arrest. "Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right.'" *Hartman*, 547 U.S. at 256 (quoting *Crawford-El*, 523 U.S. at 588 n.10). It is equally certain that "the law is settled that as a general

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[18] "Even though he could have been discharged for no reason whatever . . . he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Mt. Healthy*, 429 U.S. at 283-84 (citing *Perry v. Sindermann*, 408 U.S. 593 (1972)).

matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." *Id.*; *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

II. Qualified Immunity Adequately Protects Secret Service Agents Generally and in this Case Specifically.

As is unfortunately commonplace in our society, Petitioners invoke the mantra of "security" in seeking a diminution of civil rights. It must be firmly kept in mind that Steven Howards did nothing to get arrested but publicly criticize the Vice President. Despite the finding by the Tenth Circuit that he *could* have been arrested for a Section 1001 violation, he was *not* arrested for lying to the agents. He was permitted to freely walk away from the scene of the "assault" which later morphed into a charge of "harassment." Many people were having "unsolicited contact" (also known as "touching" or "shaking hands") with the Vice President. The only person arrested, however, was Respondent who was also the only person who publicly criticized the Vice President. This case involved no "split-second" decisions relating to life or death or highly-trained agents thrown into the crucible of a dangerously charged political demonstration. This case, however does involve allegations of criminal activity leveled between Secret Service Agents, including lying under oath, filing false reports and covering up a crime, all stemming from their having

arrested a man who had done nothing wrong, by their own accounts, but who had simply criticized the Vice President.

"It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties." *Beilan v. Bd. of Pub. Educ.*, 357 U.S. 399, 415 (1958) (internal quotation marks omitted). The balance between safety and civil liberties was struck over two hundred years ago. It is imperative that in times of crisis "our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship." *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1012 (N.D. Cal. 2009). It is in the name of our national identity that this Court held:

> [W]e must preserve our commitment at home to the principles for which we fight abroad. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-165 (1963) ("The imperative necessity for safeguarding these rights . . . under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action"); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile").

Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).

This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980). "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison*, 379 U.S. at 74-75. There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270; *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Sullivan*, 376 U.S. at 270); *see also Bond v. Floyd*, 385 U.S. 116, 136 (1966) ("Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.").

This case, better than most, illustrates why *Hartman* should not be extended and why qualified immunity sufficiently protects Petitioners. When Howards wandered back into view of the agents having been gone for several minutes, Petitioners had at their disposal all the legal tools necessary to ensure the protection of the Vice President. They could have simply asked (or forced) Howards to show them the contents of his bag and either patted him down or wanded him for weapons if they had any actual concerns. *See Terry v. Ohio*, 392 U.S. 1 (1968). They did nothing of the sort. Abundant evidence exists that the agents arrested him because they were entirely unhappy with his protected speech and his attitude

toward them. Qualified immunity is more than sufficient when law enforcement officers so grossly abuse their power.

A. Qualified Immunity Sufficiently Protects Secret Service Agents.

"In most cases, qualified immunity is sufficient to 'protect officials who are required to exercise their discretion and the related public interest in encouraging vigorous exercise of official authority.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). This Court has repeatedly explained the rationale behind this standard, and emphasized that behavior falling outside of the scope of qualified immunity should be deterred – deterrence that cannot be effectuated through the application of absolute immunity. With respect to police officers, this Court has said:

> [T]he judicial process will on the whole benefit from a rule of qualified rather than absolute immunity. We do not believe that the *Harlow* standard, which gives ample room for mistaken judgments, will frequently deter an officer from submitting an affidavit when probable cause to make an arrest is present.

Malley v. Briggs, 475 U.S. 335, 343 (1986). Similarly, when determining that qualified, rather than absolute, immunity should be afforded to prosecutors with

respect to their actions in giving police officers legal advice, this Court expressed the same reasoning:

> As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . [W]here an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.

Burns v. Reed, 500 U.S. 478, 494-95 (1991) (internal quotation marks omitted) (emphasis in original).

Law enforcement agents have long been protected by qualified immunity, *see, e.g. Anderson v. Creighton*, 483 U.S. 635, 644 (1987), including Secret Service agents.[19] *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Unus v. Kane*, 565 F.3d 103, 125 (4th Cir. 2009). Appropriately, Secret Service agents have been denied the protection of qualified immunity where they have violated clearly established constitutional

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[19] Adding to the adequacy of the protection provided to Secret Service agents by qualified immunity, Secret Service agents are indemnified by the Department of Homeland Security "for any verdict, judgment or other monetary award rendered against such employee, provided the Secretary determines that (1) the conduct giving rise to such verdict, judgment or award was within the scope of the employee's employment and (2) such indemnification is in the interest of the United States." Dep't Homeland Sec., M.D. No. 0415 (Sept. 26, 2005).

rights. *See Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994).[20]

This Court has explained that an officer will "not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the action complained of should be undertaken]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341. Law enforcement, including the Secret Service, has been well-protected by this standard for decades.

The immunity standard in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), itself offers great protection to Petitioners and forecloses all claims regardless of motive in which the official's conduct did not violate clearly established law. Even if the law is clearly established, normal standards applied to First Amendment cases provide ample protection to Petitioners. For example, when the subject matter of the speech does not impact on a matter of public concern, there is no First Amendment claim. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick*, 461 U.S. at 146. Even if the speech is protected, all that defendant officers need do to defeat a claim is to show that regardless of the speech, an arrest would have been made anyway. *Mt. Healthy*, 429 U.S. at 287. "Various

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[20] The Second Circuit denied qualified immunity to a Secret Service agent for a Fourth Amendment violation with nary a mention of *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

procedural mechanisms already enable trial judges to easily weed out baseless claims that feature a subjective intent element." *Crawford-El*, 523 U.S. at 593. This Court has made clear that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits." *Butz v. Economou*, 438 U.S. 478, 508 (1978). The procedural mechanisms available to defendants include filing a motion to dismiss or asserting immunity or "some other common-law or constitutional privilege on summary judgment." *Id.* at 507-08 & n.35.

Because qualified immunity sufficiently protects Secret Service agents, including Petitioners, from liability where appropriate, the Tenth Circuit's opinion with respect to absolute immunity should be affirmed.

B. Petitioners Are Not Entitled to Qualified Immunity Because the Law Was Clearly Established.

Petitioners are mischaracterizing an absolutely crucial point in the debate over whether the law is or is not clearly established. *Hartman* was simply an acknowledgement by this Court that when a retaliatory prosecution is alleged in response to protected speech, an essential element of the constitutional tort includes the absence of probable cause due to the complexity of the decision-making process necessarily engaged in prior to launching a prosecution. If

probable cause exists, one element of the claim is thus unprovable therefore a retaliatory prosecution lawsuit is foreclosed. At no time did this Court hold that a First Amendment violation did not occur in *Hartman*. Retaliatory prosecutions supported by probable cause were not somehow legalized by this Court. This Court merely precluded a lawsuit for the First Amendment violation by adding a Fourth Amendment element to the cause of action.

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. A right is clearly established if a reasonable officer would understand that what he or she is doing violates that right and "the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. The test is whether an officer is on notice that the conduct is unlawful – not whether they may eventually be liable for damages for their unlawful conduct. *Hartman* simply held that a suit for such clearly established misconduct will be foreclosed when probable cause is found. Similarly, *Hartman* did not throw into disarray well-established law that a retaliatory arrest is unlawful. "Unlawful" is not the same as "not-actionable." Prosecutors, for example, are completely immune from civil liability for violations under *Brady v. Maryland*, 373 U.S. 83 (1963) during the prosecutorial phase of a case however this by no means casts uncertainty as to the well-established law regarding their *Brady* obligations to

divulge exculpatory evidence in a criminal case. Petitioners ignore this vital distinction.

Petitioners have no colorable claim to qualified immunity because, as *Hartman* itself recognized, the unconstitutionality of a law enforcement action taken to punish First Amendment rights is long settled. *Hartman* teaches that "*the law is settled* that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out." 547 U.S. at 256 (emphasis added) (citing cases).

An officer's entitlement to qualified immunity turns on whether "[a] Government official's *conduct* violates clearly established law." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (emphasis added). Here, any reasonable Secret Service agent plainly would have understood that individuals could not be arrested in retaliation for exercising their First Amendment rights. Petitioners therefore cannot claim qualified immunity for arresting Respondent in retaliation for having exercised his First Amendment rights.

Qualified immunity does not turn, as Petitioners and the government would have it, on whether the existence of a damages *remedy* for clearly unconstitutional *conduct* is settled. Petitioners erroneously claim that they are entitled to qualified immunity because lower federal courts are divided over "whether th[is] tort is cognizable" in a damages action. (Pet'rs Br. 41 (citing *Wilson v. Layne*, 526 U.S. 603

(1999).) But nothing in *Wilson*, or any of this Court's qualified immunity cases, suggests that the existence or absence of a civil damages remedy for unconstitutional conduct has any relevance to qualified immunity. To the contrary, *Wilson* upheld qualified immunity because the officers there reasonably could have believed their conduct was "lawful." 526 U.S. at 615. Whether or not these Petitioners might have hoped or believed they might avoid a later damages lawsuit for their unconstitutional conduct, no reasonable officer could have believed that the underlying conduct was itself "lawful."

The Tenth Circuit correctly noted that "no party [asserted] on appeal that the law on retaliatory arrests was not 'clearly established' in this circuit either before or after *Hartman*," and correctly concluded that the law regarding retaliatory arrests is and has been well established. (Pet. App. 34 n.14.) To establish a First Amendment retaliation claim, the court below stated that "a plaintiff must show that (1) he was engaged in constitutionally protected activity, (2) the government's actions caused him injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the government's actions were substantially motivated as a response to his constitutionally protected conduct." (*Id.* at 23). The Tenth Circuit determined that throughout the course of this litigation, Petitioners had never argued that the law on retaliatory arrests was not well-settled. (*Id.* at 34 n.14). The Court of Appeals also noted that Petitioners never argued that

Howards had not established the elements of a retaliatory arrest claim. (*Id.* at 35). Putting aside the fact that they have actually waived the argument by advancing it in this Court for the first time, Petitioners mistakenly conflate the concepts of what *defines* clearly established unlawful conduct with what this Court deems *actionable*. Petitioners' concession below that Howards is able to prove the elements of a retaliatory arrest satisfies the *Mt. Healthy* test and is sufficient to establish the existence of a constitutional violation.

C. Howards Had a Clearly Established Right to be Free From Retaliatory Arrest in Violation of the First Amendment.

Adopting Petitioners' erroneous argument *arguendo* that the law prohibiting retaliatory arrests was not well-settled on a national level as correct, the fact remains that within the Tenth Circuit, it was clearly established that a lack of probable cause was not a necessary element of a retaliatory arrest claim. (Pet. App. 34 n.14 (citing *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)).) As previously explained, the *Hartman* opinion makes clear that it applies only to retaliatory prosecutions and casts no doubt upon the continuing illegality of retaliatory arrests. The fact that other circuit courts have unilaterally extended *Hartman* has no impact on the clearly established law within the Tenth Circuit. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644

(2009) ("We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.").

Because *Hartman* did not affect the state of the law with respect to retaliatory arrest, the *DeLoach* court's holding that a lack of probable cause is not a necessary element of a retaliatory arrest claim remains controlling in the Tenth Circuit. That holding has been clearly established since at least 1990, when the *DeLoach* opinion was published. Petitioners therefore violated Howards' clearly established constitutional right to be free from retaliatory arrest, and they are not entitled to qualified immunity.

D. There Is no Common Law Tradition of Affording Secret Service Agents Absolute Immunity.

For decades, this Court has strenuously avoided extending immunity by judicial fiat. Government agents may be entitled to one of two types of immunity for claims brought against them: absolute or qualified. *Harlow*, 457 U.S. at 807. "For executive officials in general, however, [this Court's] cases make plain that qualified immunity represents the norm." *Id.* This Court has made clear that absolute immunity is only warranted where "an official claiming immunity

under § 1983 can point to a common-law counterpart to the privilege he asserts." *Malley*, 475 U.S. at 339-40. Even where there is a common-law tradition of immunity, this Court "[has] considered whether § 1983's [or *Bivens*'] history or purposes nonetheless counsel against recognizing the same immunity in [these] actions." *Buckley*, 509 U.S. at 269 (internal quotation marks omitted). In evaluating Section 1983's purpose, this Court's "cases have followed a 'functional' approach to immunity law," considering whether an official's "functions require absolute immunity." *Harlow*, 457 U.S. at 810-11. "In most cases, qualified immunity is 'sufficient to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Buckley*, 509 U.S. at 268 (quoting *Butz*, 438 U.S. at 506).

Petitioners have not provided – and cannot provide – any authority establishing a common-law tradition of the extension of absolute immunity to Secret Service agents or any other law enforcement officers. Further, the functions of Secret Service agents do not warrant absolute immunity nor a presumption of regularity as argued by Petitioners. (Pet'rs Br. 36.) The claim that these agents function as elite law enforcement officers who "stand in sharp contrast to the more routine police encounters" and are "supported by extensive and thorough training" rings hollow in light of the facts of this case. (*Id.*)

This Court has consistently made clear that it does not have the authority to create new absolute

immunities out of whole cloth based on its own policy preferences:

> Although we have found immunities in § 1983 that do not appear on the face of the statute, "we do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984). "Our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986).

Buckley, 509 U.S. at 268; *see also Burns*, 500 U.S. at 493. This Court looks to common-law tradition in search of a history of granting absolute immunity for the functions performed. *See Burns*, 500 U.S. at 498 (Scalia, J., concurring in the judgment and dissenting in part) ("Where we have found that a tradition of absolute immunity did not exist as of 1791, we have refused to grant such immunity under § 1983.").

This Court has found a common-law tradition of immunity for a narrow category of government officials, including prosecutors "for actions that are connected with the prosecutor's role in judicial proceedings," *Burns*, 500 U.S. at 494; "legislators, in their legislative functions, and [for] judges, in their judicial functions," *Harlow*, 457 U.S. at 807; and the President of the United States, "from damages liability predicated on his official acts." *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

Where this Court has been unable to identify a common-law tradition of immunity, however, this Court has declined to afford officials absolute immunity. *Burns*, 500 U.S. at 493 ("Absent a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*, we have not been inclined to extend absolute immunity from liability under § 1983."). For example, this Court has declined to extend absolute immunity to "federal executive officials exercising discretion," including members of the President's Cabinet, determining that such officials are entitled only to qualified immunity. *Butz*, 438 U.S. at 507. Consistent with *Butz*, this Court has denied absolute immunity even to Cabinet members, reasoning:

> Members of the Cabinet are direct subordinates of the President, frequently with greater responsibilities, both to the President and to the Nation, than White House staff. . . . It is no disparagement of the offices held by petitioners to hold that Presidential aides, like Members of the Cabinet, generally are entitled only to a qualified immunity.

Harlow, 457 U.S. at 809.

This Court's precedents make clear that absolute immunity is available only where there has been, at a minimum, a common-law tradition of granting immunity to the officials in question. Petitioners' reliance on *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), for the proposition that Secret Service agents

are entitled to absolute immunity is unavailing and incorrect. It appears that even the Second Circuit has backed away from *Galella*. The court in *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), held a Secret Service Agent liable for a Fourth Amendment violation for allowing the media to enter a private home.

The Second Circuit's outlying opinion completely ignored this Court's mandate that "our initial inquiry, the first and crucial question, is whether the common law recognized [the absolute immunities asserted]." *Burns*, 500 U.S. at 499 (Scalia, J., concurring in the judgment and dissenting in part) (internal quotation marks and citations omitted) (alteration in original). The Second Circuit engaged in precisely the type of "freewheeling policy choice" that this Court's precedents forbid. *Malley*, 475 U.S. at 342.

Because there is no common-law tradition of granting immunity to Secret Service agents, Petitioners are not entitled to absolute immunity, and the Tenth Circuit's opinion with respect to the absolute immunity issue should be affirmed. "[I]f application of the principle [of common-law immunity] is unclear, the defendant simply loses." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

E. The Functions of Secret Service Agents Do Not Warrant Absolute Immunity.

Even where there is a common-law tradition of affording absolute immunity to the government

officials in question – and there is no such tradition with respect to Secret Service agents – this Court has still insisted on evaluating the history and purposes of Section 1983 in order to determine whether absolute immunity is warranted. *Malley*, 475 U.S. at 339-40. "Not surprisingly, [this Court has] been quite sparing in recognizing absolute immunity for state actors in this context." *Buckley*, 509 U.S. at 269 (internal quotation marks omitted). In evaluating the history and purpose of Section 1983, this Court has "followed a 'functional' approach to immunity law." *Harlow*, 457 U.S. at 810.

It is clear that law enforcement agents serve a function entitled only to qualified immunity, and this Court has refused to extend absolute immunity to other officials with respect to actions similar to those engaged in by law enforcement. *See, e.g. Burns*, 500 U.S. at 495; *Buckley*, 509 U.S. at 274 ("[I]f a prosecutor plans and executes a raid on a suspected weapons cache, he has *no greater claim to complete immunity than activities of police officers allegedly acting under his direction.*" (emphasis added) (internal quotation marks omitted)); *id* at 276 ("When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.").

Even if there were a common-law tradition of extending absolute immunity to law enforcement agents – and there is not – "[Section] 1983's history [and] purposes nonetheless counsel against recognizing the same immunity" for law enforcement agents,

including Secret Service agents. *Buckley*, 509 U.S. at 269. As a result, the Tenth Circuit's opinion with respect to absolute immunity should be affirmed.

III. A First Amendment Retaliatory Arrest Claim Is Cognizable Pursuant to *Bivens*.[21]

Because this Court has indicated a willingness to allow First Amendment claims against federal agents pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and because the two-part test for *Bivens* actions announced in *Wilkie v. Robbins*, 551 U.S. 537 (2007), applies in this case, the decision below should be affirmed.

At the outset it should be noted that Petitioners admitted *Bivens* jurisdiction in their answers to the complaint. (JA 16, 26.) They continued to admit that this case is appropriately filed as a *Bivens* action in

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[21] Petitioners and *Amicus* United States, contend, for the first time on this appeal, that Howards' First Amendment claim for retaliatory arrest is not authorized pursuant to *Bivens*. (Pet'rs Br. 53-55.) At the outset, Respondent objects to this argument as it was neither raised in the Petition for a Writ of *Certiorari*, nor formed any part of the *cert.* grant. Previously, this Court has addressed issues not raised below however, only after noting that the "respondent does not object." *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). It is clear that this Court does "not normally decide issues not presented below," *id.*, although the Court is not precluded from doing so. *See, e.g. Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). While Respondent objects to this argument, in an abundance of caution will nevertheless provide a response.

the Final Pretrial Order. (JA 179 ("If this Court finds, as Defendants contend, that Defendants were acting under color of federal law instead of state law pursuant to 42 U.S.C. § 1983, the Court has jurisdiction under *Bivens*.").) Reichle's and Doyle's Motion for Summary Judgment, Docket Entry 155: page 8 argued that "[t]he facts of this case require analysis under *Bivens*."

A. This Court Has Indicated that a First Amendment Claim May be Brought Pursuant to *Bivens*.

When confronted with First Amendment claims pursuant to *Bivens*, this Court has repeatedly "assume[d], without deciding, that [a] First Amendment claim is actionable under *Bivens*." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009); *see also Bush v. Lucas*, 462 U.S. 367, 373 (1983) ("Thus, we assume, a federal right has been violated and Congress has provided a less than complete remedy for the wrong."). This Court has explicitly recognized, with respect to First Amendment *Bivens* claims, that "Congress has not expressly precluded the creation of such a remedy by declaring that existing statutes provide the exclusive mode of redress." *Id.*

Further, this Court has indicated the availability of *Bivens* for claims pursuant to the First Amendment:

> The factors necessary to establish a *Bivens* violation will vary with the constitutional

> provision at issue. Where the claim is invidious discrimination in contravention of the *First and Fifth Amendments*, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose.

Iqbal, 129 S. Ct. at 1948 (emphasis added). In *Hartman*, this Court indicated that *Bivens* is available for First Amendment retaliation by federal law enforcement officers: "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out. . . . When the vengeful officer is federal, he is subject to an action for damages on the authority of *Bivens*." *Hartman*, 547 U.S. at 256.

Petitioners' reliance on this Court's recent opinion in *Minneci v. Pollard*, 132 S. Ct. 617 (2012), for the proposition that there is resistance to any extension of *Bivens* to First Amendment claims, is misplaced. This Court held that, "[b]ecause we believe that in the circumstances present here state tort law authorizes adequate alternative damages action – actions that provide both significant deterrence and compensation," a *Bivens* claim could not be asserted under those circumstances. *Id.* at 620. That conclusion was not based on the idea that an Eighth Amendment violation is not actionable pursuant to *Bivens*, *see Carlson v. Green*, 446 U.S. 14 (1980), but on the fact that alternative remedies were available to the claimant in that case. As discussed below, this

Court has recognized that no such alternative remedies are available for a federal agent's violation of the First Amendment's guarantee of free speech. *Minneci* is therefore inapposite.

Where this Court has assumed without deciding that a *Bivens* action is available for a First Amendment violation but gone on to deny the claim, it has done so based on the availability of alternative remedies. *See Lucas*, 462 U.S. at 368 ("Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy."). Historically, this Court has recognized the importance of giving litigants a forum to pursue constitutional claims:

> [W]e presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. "The very essence of civil liberty," wrote Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 163 (1803), "certainly consists in the right of every individual to claim the protection of the

> laws, whenever he receives an injury. One of the first duties of government is to afford that protection."

Davis v. Passman, 442 U.S. 228, 242 (1979). Howards' First Amendment retaliation claim certainly falls under the purview of justiciable constitutional rights, as, "the mention of retaliation brings with it a tail-wind of support from our longstanding recognition that the Government may not retaliate for exercising First Amendment speech rights." *Wilkie*, 551 U.S. at 555.

This Court should reject the government's contention that individuals selectively arrested in violation of the First Amendment by federal officials have no *Bivens* remedies. The government concedes that this Court has allowed a *Bivens* remedy against federal officials engaged in "discrimination in violation of the Due Process Clause of the Fifth Amendment," and accordingly that *Bivens* might "provide[ ] a cause of action for at least some plaintiffs who allege that their arrest violated equal-protection principles." (*Amicus* Br. of United States 10, 14 (citing *Davis v. Passman*, 442 U.S. 228 (1979) (gender discrimination).)

A First Amendment retaliatory arrest claim is analytically identical to a due process/equal protection already held cognizable under *Bivens* in *Davis v. Passman*. As this Court has written, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most

basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). It is for this reason this Court has judged claims of unconstitutional selectivity by law enforcement officers – whether based on protected exercise of First Amendment rights or on a person's race or nationality – "according to ordinary equal protection standards." *Wayte v. United States*, 470 U.S. 598, 608 (1985) (alleged selective prosecution in violation of First Amendment); *accord United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (alleged selective prosecution based on race); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (unconstitutional selective enforcement of law based on nationality).

Thus, by definition, an individual complaining of unconstitutional selective law enforcement based on the exercise of that person's First Amendment rights is claiming a violation of the due process right to equal protection of the laws: but for the unconstitutional consideration, that person (like those otherwise similarly situated) would not have been arrested. Whether analyzed directly under the First Amendment, or under the Equal Protection component of the Fifth Amendment Due Process Clause, a person selectively arrested based on constitutionally protected activity is entitled to a *Bivens* remedy.

B. Howards' Claim Meets the Two-Part Test Set Forth in *Wilkie* for *Bivens* Claims.

"*Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover damages against the official in federal court despite the absence of any statute conferring such a right." *Carlson*, 446 U.S. at 18. This Court has established a two-part test for determining whether a *Bivens* action may be brought for a particular constitutional violation. The first step involves determining "whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie*, 551 U.S. at 550. The second step "is a subject of judgment: the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal litigation." *Id.* (internal quotation marks omitted). Because there is no alternative process for protecting Howards' rights under the First Amendment, and because no "special factors counsel[] hesitation before authorizing" a First Amendment *Bivens* claim in this case, *id.*, the decision below should be affirmed.

This Court has declined to permit *Bivens* actions for constitutional violations based on the availability of alternative processes for protecting the constitutional rights implicated. *See, e.g. Minneci*, 132 S. Ct.

at 620. In the context of First Amendment claims, this Court has recognized that "Congress has not expressly precluded the creation of [a *Bivens*] remedy by declaring that existing statutes provide the exclusive mode of redress." *Lucas*, 462 U.S. at 373. Indeed, with respect to a federal law enforcement agent's retaliation based on speech protected by the First Amendment, this Court has noted that such a federal agent "is subject to an action for damages under the authority of *Bivens*," *Hartman*, 547 U.S. at 256, thus at least implicitly recognizing that no alternative process is available to pursue such claims.

Outside of a *Bivens* action, Howards has no vehicle to pursue a remedy for the violation of his First Amendment rights in this case. As such, the first *Wilkie* factor weighs in favor of allowing Howards' *Bivens* action and affirming the decision below.

C. No Special Factors Counsel Against Allowing a First Amendment *Bivens* Claim.

Petitioners contend that special factors exist in this case, stemming from the importance of Secret Service agents' responsibilities to protect the President and the Vice President. (Pet'rs Br. 55.) To the extent that Petitioners need some protection from litigation involving allegations of First Amendment retaliation, the doctrine of qualified immunity provides that protection. *See Buckley*, 509 U.S. at 268 ("In most cases, qualified immunity is sufficient to 'protect officials who are required to exercise their

discretion and the related public interest in encouraging vigorous exercise of official authority.'" (quoting *Butz*, 438 U.S. at 506)); *Burns*, 500 U.S. at 494-95 ("[Qualified immunity] provides ample protection to all but the plainly incompetent or those who knowingly violate the law."). Qualified immunity has, in fact, protected federal officials from liability in *Bivens* actions where appropriate. *See, e.g. Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011).

This Court has found special factors counseling against allowing a *Bivens* action where, for example, the Court has been unable to discretely define the type of claim brought (as distinguished from a discrete claim that may result in a multitude of litigation). *Wilkie*, 551 U.S. at 561 n.11.

Here, Petitioners contend that subjecting Secret Service agents to litigation for First Amendment retaliatory arrest will impede their ability to protect the President because of the possibility of lawsuits stemming from their action. (Pet'rs Br. 55.) This is precisely the type of factor that this Court has rejected. *See Wilkie*, 551 U.S. at 561 n.11. Petitioners do not – and cannot – contend that First Amendment retaliatory arrest claims are so hard to define that "no one can tell in advance what claim might qualify or what might not." *Id.* There are therefore no "special factors counseling" against allowing a *Bivens* action for retaliatory arrest in violation of the First Amendment, and the decision below should be affirmed.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Tenth Circuit Court of Appeals and remand this case for a trial on Respondent's First Amendment retaliatory arrest claim.

Respectfully submitted,

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February 20, 2012

REPLY BRIEF

No. 11-262

In The
Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR.,
DAN DOYLE,
Petitioners,

v.

STEVEN HOWARDS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

Petitioners, Secret Service agents acting in their protective capacities, arrested Respondent Howards after he made unsolicited contact with the Vice President in an open, unmagged area. Howards brought a *Bivens* claim against the Secret Service agents, alleging that the arrest was retaliatory and violated his First and Fourth Amendment rights. The court below found that Petitioners had probable cause to arrest Howards, and dismissed his Fourth Amendment claim. Howards has not challenged that ruling.

The court below should have also dismissed Howards' First Amendment claim because Petitioners were acting with probable cause. Just as this Court did with regard to retaliatory prosecution claims in *Hartman v. Moore*, 547 U.S. 250 (2006), this Court should hold that the absence of probable cause is a required element of a retaliatory arrest claim. Howards also lacks a cause of action because *Bivens* has not been, and should not be, extended to First Amendment retaliatory arrest claims.

Even if Howards had a cognizable claim, Petitioners are entitled to qualified immunity. In the wake of *Hartman*, several circuit courts split over whether the absence of probable cause was an element of a retaliatory arrest claim. In light of this split, it was certainly not clearly established whether Howards was required to prove that he was arrested without probable cause, and thus Petitioners should be protected by qualified immunity from Howards' claim.

Although Howards dwells on irrelevant facts and allegations, the operative facts are straightforward: Howards made unsolicited contact with the Vice President in an open, unsecured area; Howards lied to Secret Service agents about the contact; and there was probable cause for his arrest.

STATEMENT OF THE CASE

Howards accepts Petitioners' statement of the case, but nonetheless discusses several theories that he claims reveal Petitioners' supposed retaliatory motive and a cover-up.

Howards states that his interaction with the Vice President was like a handshake. Br. at 31 ("Many people were having 'unsolicited contact' (also known as 'touching' or 'shaking hands') with the Vice President"). There is no dispute, however, that Howards' contact was not a handshake or similar consensual contact. Howards described the contact as an open-handed "pat." Joint Appendix ("JA") 117–18. The only difference in the other witnesses' characterizations was over the amount of force involved. Agents Doyle and Daniels, and photographer David Bohrer, called it a "slap." JA 86, 416, 404. Agent Lee characterized the contact as a "shove." JA 379. Agent Wurst used the term "push-off move." JA 404. Agent McLaughlin described the contact as "very forceful," JA 344, and confirmed that it was not a handshake. JA 360–61. Because an assault has no minimum force requirement, this deliberate and nonconsensual contact could reasonably be regarded as an assault even when viewed through Howards' lens.[1]

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[1] *See, e.g.*, *United States v. Calderon*, 655 F.2d 1037, 1038 (10th Cir. 1981) (affirming assault conviction of protester who threw eggs at Congressman, under parallel statute); *United States v. Lewellyn*, 481 F.3d 695, 697–99 (9th Cir. 2007) (assault under parallel federal statute can be premised on a "seemingly slight, but intentional, offensive touching").

Howards argues that if Agent Doyle believed that Howards had assaulted the Vice President, Agent Doyle should have immediately arrested Howards rather than allow him to walk away. Br. at 31 ("[Howards] was permitted to freely walk away from the scene of the 'assault' "). Agent Doyle explained in his deposition that it was Secret Service policy not to arrest an individual immediately under these circumstances, because conduct like Howards' might be a feint or diversion. JA 95 ("He could have been probing the crowd for an incident that could have taken place further"). Additionally, Howards was moving away from the Vice President. JA 91, 94 ("I didn't want to escalate the situation any further than it was with the Vice President being in proximity . . . but I wanted to separate the Vice President and Mr. Howards as much as possible"). Agent Doyle's job was to continue protecting the Vice President. The job of questioning and, if appropriate, arresting Howards fell to Agent Reichle as the intelligence coordinator. JA 334–35.

Agent Reichle arrived on the scene within minutes, JA 90–91, and understood that something serious had happened. JA 265–66 (calling the protective intelligence coordinator is "like picking up the phone and dialing 9-1-1"). Agent Reichle's fellow agents told him that Howards had gone "hands-on" with the Vice President. JA 73, 369–71. Agent Reichle tried to speak with Howards to determine whether Howards posed a threat. This effort was stymied by Howards' refusal to cooperate, which ultimately forced Agent Reichle to make an immediate decision whether to arrest Howards based on the limited information available and without yet being able to

determine whether Howards posed a threat. JA 44–46, 241–42, 271.

Throughout the incident, Howards was looking for his son in the crowd. JA 220–25. However, because Howards refused to speak with the agents, they did not know this. JA 227. From the agents' perspective, Howards appeared to be moving erratically and trying to evade them. JA 83 (Howards was "talking on his cell phone and walking quickly—quickly throughout the crowd. He was very anxious about something."); JA 86–87 (Howards "was acting very erratic within the crowd and he was moving around the crowd very quickly." "All his movements were very quick and erratic." "He had no set line to follow."). The agents were also concerned about the bag Howards was carrying. JA 87 (Howards was never more than 20 yards away from the Vice President); JA 91 ("Plus he had a package in his hands, which I thought was a—a threat and I wanted him to step away from the Vice President in case there was something in that package that could harm the Vice President.").

Lastly, Howards mischaracterizes the agents' post-arrest discussions and disagreement regarding how to proceed as a "cover-up." Br. at 2–3, 31–32. Howards' contact did not injure the Vice President, or disrupt his plans or schedule. It was in this context that Agents Reichle and McLaughlin testified about their respective perceptions hours after the arrest. At the time of the arrest, Agent McLaughlin raised no objection to the arrest. Agent Reichle was later instructed not to pursue it further. Importanly, Howards offers no explanation of how this supposed "cover-up" relates to the issues before

this Court. Rather, Howards' merely attempts to parlay irrelevant details into a nefarious sounding conspiracy.

ARGUMENT

I. THE EXISTENCE OF PROBABLE CAUSE BARS FIRST AMENDMENT RETALIATORY ARREST CLAIMS.

A. This Court Should Apply *Hartman* to Retaliatory Arrest Claims by Making the Absence of Probable Cause a Required Element.

This Court has repeatedly emphasized the need for objective standards in determining causation in retaliation claims. In *Hartman v. Moore*, this Court recognized the particular difficulty of making a causation determination in certain retaliation actions and held that adding the absence of probable cause as an element of a First Amendment retaliatory prosecution claim would effectively bridge the causal gap by linking the complained-of action to the government actor's retaliatory animus. 547 U.S. 250, 259 (2006).

In *Hartman*, this Court discussd how retaliation claims arising out of criminal contexts differ significantly from civil claims—"[w]hen the claimed retaliation for protected conduct is a criminal charge, however, a constitutional tort action will differ from this standard case[.]" *Id.* at 260. Specifically, the *Hartman* Court explained

> [w]hat is different about a prosecution case, however, is that there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove

> retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge. Demonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution, while establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive.

Id. at 261. *See also id.* at 265 ("the significance of probable cause or the lack of it looms large, being a potential feature of every case, with obvious evidentiary value"). In cases, like the one before this Court, where there is a particular complexity of causation, "showing an absence of probable cause will have high probative force" and "must be pleaded and proven." *Id.* at 265–66.

Just as *Hartman*'s rule provided a bridge for the causal gap in retaliatory prosecution claims, the same rule should be applied here, in retaliatory arrest claims. Both retaliatory prosecution and arrest claims ultimately turn on the motive of the government actor. Both claims require a plaintiff to prove that retaliatory motive was the but-for cause of the complained-of action. Both claims often involve difficult causation problems due to the presence of numerous actors. And, importantly, this Court has routinely observed the importance of affording certain deference to government actors making the decision to prosecute or arrest.

As the Court noted earlier this term, courts should hesitate to second-guess police officers who must

make urgent decisions with serious implications: because "lawful conduct may portend imminent violence" and "a combination of events each of which is mundane when viewed in isolation may paint an alarming picture, . . . judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 132 S. Ct. 987 (2012). The well-established probable cause standard employed by the *Hartman* would provide an objective metric by which to judge, but not second guess, arrest decisions. Indeed, the deference this Court extended to police officers in *Ryburn* should likewise extend to Secret Service agents acting in their protective capacities.

Extending *Hartman*'s absence of probable cause rule also comports with the Court's decision in *Crawford-El*, *cf.* Br. at 10 n.6, because it is not an overly-broad rule making *all* retaliation claims harder to prove. *Crawford-El v. Britton*, 523 U.S. 574 (1998). Rather, the proposed rule is narrow and employs a pre-existing, objective and highly probative piece of evidence (the presence or absence of probable cause) as its filter.

Howards posits that extending *Hartman* to retaliatory arrest claims will result in "the basic vitality of the First Amendment [being] 'bureaucratized' into irrelevancy, as it will consistently be trumped by the pettiest of offenses." Br. at 16. In support of such rhetoric, Howards trots out a parade of horribles that would allegedly occur under such a rule. For the same reasons that this Court rejected this very argument in *Hartman*, it should do so here.

In *Hartman*, the respondent argued that the absence of probable cause should not be an element of a retaliatory prosecution claim because it "would result in virtually no protection from unconstitutionally motivated investigations and prosecutions, because the government will almost always be able to fabricate a colorable claim of probable cause." Brief of Respondent at 1, *Hartman*, 547 U.S. 250 (No. 04-1495), 2005 WL 2653949 (Oct. 14, 2005) ("*Hartman* Resp. Br."). "Consequently, under Petitioners' rule, the government could, free from any constitutional restraint, engage in a naked policy of prosecuting only political opponents of the President or the District Attorney for those less serious offenses that are normally not prosecuted." *Id.* at 29. *See also id.* at 30 ("The Court should not open the door to authorizing such political and racial profiling."). Howards makes the identical argument as the *Hartman* respondent.

The *Hartman* Court rejected such fears, seeing fit to hold that the absence of probable cause is an element of a retaliatory prosecution claim. Were there a basis for Howards' fears, he would be able to point to post-*Hartman* examples of such abuses in the retaliatory prosecution context. Howards would also be able to provide examples of such draconian law enforcement actions occurring within the circuits that extended *Hartman* to retaliatory arrests. Howards' resort to hypothetical examples shows that in the wake of both *Hartman* and its extension, the First Amendment has not lost its importance or vitality.

Petitioners could likewise suggest extreme ramifications that could occur under Howards' rule.

To wit, Howards candidly concedes that "theoretically, every person arrested could allege a retaliatory arrest for protected speech[.]" Br. at 13. Thus, under the contrary rule proposed by Howards and his *amicus*, the ACLU, in which there would be no filtering of claims based on probable cause, a protester would be entitled to bring a claim of retaliation if he is arrested for refusing to leave a restricted area, so long as he makes political comments. In such circumstances, Howards' rule would not permit a Secret Service agent to remove the individual without the risk of incurring a lawsuit or personal liability. *Hartman*'s rule provides an objective standard that would apply in just such circumstances to prevent frivolous claims, and is particularly fitting for Secret Service agents acting in their protective capacities in highly visible fora.[2]

In the matter currently before this Court, a retaliatory inference is especially weak, and cannot be readily inferred from Howards' comment that the Vice President's policies in Iraq were disgusting. While some viscerally offensive speech might be expected to engender a strong retaliatory response (*e.g.* flag-burning, picketing soldiers' funerals), it is

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[2] Such an extension of *Hartman* to Secret Service agents is particularly appropriate because any time an agent is acting in a protective capacity, it is a serious matter. The offenses at issue here were both felonies. 18 U.S.C. § 1751(e); 18 U.S.C. § 1001. *Accord* John Koerner, *Between* Healthy *and* Hartman: *Probable Cause in Retaliatory Arrest Cases*, 109 Colum. L. Rev. 755, 794 (2009) (suggesting that *Hartman*'s no-probable-cause rule apply to arrests for serious infractions like felonies, where it can be presumed that the claimant would have been arrested anyway).

hard to believe that highly trained Secret Service agents, who regularly deal with strident and hostile political protesters, would have retaliated against Howards for this speech.

Finally, Howards spends significant time arguing that this Court should *not* extend *Hartman* because the circuit courts that have extended *Hartman* to retaliatory arrest claims have written shorter opinions than the two circuits that have refused to extend *Hartman*. Br. at 9 ("each circuit that has unilaterally extended *Hartman* into the retaliatory arrest arena has done so without undertaking the rigorous analysis of the court below"). Needless to say, Howards offers no authority to support the proposition that the length of a circuit court's decision is a barometer of its validity.

B. Reliance on *Mt. Healthy* Is Insufficient.

Howards argues that this Court should not extend *Hartman* to First Amendment retaliatory arrest claims because this Court's holding in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 273 (1977), offers sufficient protection for a defendant in a First Amendment retaliatory arrest matter. Br. at 13–15. In *Mt. Healthy*, this Court held that a plaintiff alleging unconstitutional retaliation must show that his conduct was constitutionally protected and that the protected conduct was a "motivating factor" in the alleged retaliatory action. 429 U.S. at 287 (internal quotations omitted). Under *Mt. Healthy*, once a plaintiff satisfies that burden, the defendant must show by a preponderance of the evidence that he would have undertaken the same action or decision "even in the absence of the protected conduct." *Id.*

Howards avers that this "has proven to be a workable test for more than three decades" and that "[h]istory has vindicated the *Mt. Healthy* test and it has functioned precisely as it was intended." Br. at 13–14.

Howards' reliance on *Mt. Healthy* is curious. If the 1977 *Mt. Healthy* test were sufficient, this Court would have had no need to create the rule it did in *Hartman*. Significantly, the respondent in *Hartman* advanced the exact same argument, which this Court rejected. *Hartman* Resp. Br. at 23 ("Petitioners completely miss the mark in arguing that precedents such as *Mt. Healthy* prohibiting improperly motivated public employment decisions do not provide appropriate guidance in the context of retaliatory investigations and prosecutions") (internal citation omitted). The *Hartman* Court determined that *Mt. Healthy*'s approach was *not* sufficient for examining causation in every retaliation claim. 547 U.S. at 260. As discussed *supra*, the *Hartman* Court specifically built upon *Mt. Healthy*'s burden-shifting framework when the retaliation claims arise from the criminal context, by adding its absence of probable cause rule. At no point in his explanation of why *Mt. Healthy* supposedly offers sufficient protection does Howards explain why, decades after *Mt. Healthy* was decided, this Court saw the need to revise *Mt. Healthy*'s framework in *Hartman*.

C. This Case Does Not Involve an Equal Protection Clause Claim.

Howards argues that First Amendment retaliation should be treated the same as Equal Protection Clause claims, and that Petitioners' proposed rule

would all but do away with Equal Protection claims of retaliatory arrest. Br. at 25–30; ACLU *Amicus* Br. at 15–18. This case, however, does not involve an Equal Protection claim. Furthermore, First Amendment claims and Equal Protection claims are different. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (in an Equal Protection action, a plaintiff must show disparate treatment amongst similarly situated individuals). The rule Petitioners propose here would only apply to retaliatory arrest claims based upon the First Amendment.

Under Petitioners' proposed rule, if probable cause exists for an arrest, there is no First Amendment retaliatory arrest claim. But that does not foreclose an Equal Protection Clause claim if the individual can show the requisite differential treatment.

II. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY

Should this Court determine that the absence of probable cause is not an element of a retaliatory arrest claim, the Petitioners here should nonetheless be protected by qualified immunity from liability. This Court explained in *Harlow v. Fitzgerald* that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" and "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." 457 U.S. 800, 818 (1982).

Likewise, this Court, in *Anderson v. Creighton*, explained that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. 635, 640 (1987).

Howards argues that the law prohibiting retaliatory arrests was clearly established and that *Hartman* cannot be viewed as having "legalized" retaliatory arrests, thus foreclosing Petitioners' qualified immunity argument. Br. at 37–41. Howards is no doubt correct that retaliatory arrests were and remain actionable. The operative question, though, is what the required elements are for a First Amendment retaliatory arrest claim and whether a reasonable Secret Service agent in June 2006 would have understood that he could be liable for a retaliatory arrest when he acted with probable cause.

Any reasonable Secret Service agent who read *Hartman* and its progeny would have been uncertain whether arresting someone with probable cause could constitute a retaliatory arrest under the First Amendment, or rather whether the elements of a retaliatory arrest claim included the absence of probable cause. Judge Kelly stated as much in his dissent in the court below: "[t]here is a strong argument that *Hartman v. Moore*, 547 U.S. 250 (2006), applies not only to retaliatory prosecutions, but also to retaliatory arrests." Pet. App. at 40.

The question of whether the absence of probable cause was an element of a claim of retaliatory arrest certainly must be considered unclear for Secret Service agents when learned judges of several circuit courts have answered the exact same question

differently. *Compare Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007) ("We agree with the Sixth Circuit that the Supreme Court's holding in *Hartman* is broad enough to apply even where intervening actions by a prosecutor are not present, and we conclude that the *Hartman* rule applies in this case"), *with Skoog v. County of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006) ("the rationale for requiring the pleading of probable cause in *Hartman* is absent here. This case presents an 'ordinary' retaliation claim."). The circuit split on this issue makes qualified immunity unquestionably appropriate under *Wilson v. Layne*. 526 U.S. 603, 618 (1999) ("[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy"). Thus, because the applicability of *Hartman* to a retaliatory arrest claim was not clearly settled, qualified immunity applies to Petitioners with regard to Howards' claims.

Howards misconstrues Petitioners' qualified immunity arguments and the relevant rules themselves. Br. at 39 ("Qualified immunity does not turn, as Petitioners and the government would have it, on whether the existence of a damages *remedy* for clearly unconstitutional *conduct* is settled"). Based on his misunderstanding, Howards argues that there was no circuit split and thus no weight should be given to this Court's holding in *Wilson*. Br. at 39–40. As noted above, Petitioners' argument is that, at the time of the arrest, it was not clearly established whether the absence of probable cause was an element of a First Amendment retaliatory arrest claim or, rather, whether an arrest with probable

cause was permissible.[3] Petitioners do not, as Howards posits, argue that it was the existence of a damages remedy that was not clearly established. As such, Howards' contention notwithstanding, the underlying circuit split warrants qualified immunity under this Court's decision in *Wilson*.[4]

The purpose of qualified immunity, especially in the context of the Secret Service's protection of the Vice President's immediate physical safety, is to foreclose retaliation lawsuits where a decision to arrest is reasonable, even if mistaken. *Hunter v. Bryant*, 502 U.S. 224, 228–29 (1991); *accord Saucier v. Katz*, 533 U.S. 194, 205 (2001), *receded from by Pearson v. Callahan*, 555 U.S. 223 (2009), ("An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense."). Here, it must be considered reasonable to arrest someone who engaged in nonconsensual contact with the Vice President, initially refused to answer questions about the interaction, and then lied to federal officials about the incident.

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[3] Indeed, even *Skoog*, upon which Howards relies so heavily, defined the constitutional right in question as "the right of an individual to be free of police action motivated by retaliatory animus *but for which there was probable cause*." 469 F.3d at 1235 (emphasis added).

[4] Likewise, the possibility that absolute immunity could apply as an affirmative defense under *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), is enough to confer qualified immunity here. *See* Opening Br. at 43–45.

Importantly, qualified immunity is addressed as of the time of the arrest. *E.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (qualified immunity analysis considers information available to a government actor at the time of the adverse action, not later); *Graham v. Connor*, 490 U.S. 386, 396 (1989) (reasonableness is judged from the perspective of a reasonable officer at the scene). Although Howards attempts to make much out of a supposed after-the-fact cover-up, Howards provides no suggestion of how the supposed disagreement among Secret Service agents has any bearing on whether the decision to arrest was arguably justified at the time, and therefore subject to qualified immunity.

III. THIS COURT SHOULD NOT EXTEND *BIVENS* TO FIRST AMENDMENT RETALIATORY ARREST CLAIMS

This Court should decline to extend *Bivens* to First Amendment retaliatory arrest claims. This Court has created a *Bivens* cause of action for three types of constitutional violations. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (Fourth Amendment); *Davis v. Passman*, 442 U.S. 228 (1979) (Due Process Clause of the Fifth Amendment); and *Carlson v. Green*, 446 U.S. 14 (1980) (Eighth Amendment's Cruel and Unusual Punishment Clause). It should go no further in this case.

A. The *Bivens* Issue Is Properly Before This Court.

Howards argues that the *Bivens* issue was improperly raised for the first time in this Court, and objects to this Court considering it. Br. at 48

n.21. Howards is mistaken. This Court's rules provide that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein." S. Ct. R. 14.1(a). *See also Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 56 (2006) ("our review may, in our discretion, encompass questions 'fairly included' within the question presented"); *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (when a question of law is a "predicate to an intelligent resolution of the question presented," it is considered "fairly included therein") (internal quotations omitted).

In *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), this Court decided that "the argument that Amtrak is a Government entity is fairly embraced within the question set forth in the petition for certiorari" because "it is quite impossible to consider whether the Government connections are sufficient to convert private-entity Amtrak into a Government actor without first assuming that Amtrak is a private entity. . . . The question of private-entity status is, in other words, a prior question." *Id.* at 379–80, 381 (emphasis omitted). Importantly, the *Lebron* petitioner argued for the first time in his merits brief that Amtrak is not a private entity. *Id.* at 379. Further, he had argued the opposite position in the appellate court. *Id.* at 378–79. That notwithstanding, the *Lebron* Court determined that the question of whether Amtrak was a government entity was a necessary predicate of the question presented and thus considered fairly included in the questions presented. *Id.* at 378.

In this matter, the question of whether a *Bivens* cause of action for a First Amendment retaliatory arrest claim exists is a fairly included and necessary prior question. *See* Opening Br. at i ("[w]hether . . . the existence of probable cause to make an arrest . . . bars [a First Amendment retaliatory arrest] claim"). As the United States points out, "[r]esolution of this threshold issue"—whether a *Bivens* action for First Amendment retaliatory arrest claims exists—"which could obviate the need to determine the precise contours of claims like respondent's, would further the interest of judicial economy." Brief for United States as *Amicus Curiae* 12 (quoting *Carlson*, 446 U.S. 14, 17 n.2 ("the interests of judicial administration will be served by addressing viability of *Bivens* action, even though not raised in the lower courts") (internal quotations omitted)).

In addition to arguing that the question is unrelated, Howards suggests that Petitioners admitted *Bivens* jurisdiction in the proceedings below. Br. at 48. Not so. Petitioners' brief in the Tenth Circuit put this argument in play: "In fact, it is unclear whether a *Bivens* claim may be pursued for an alleged First Amendment violation at all." Appellants' Opening Br. at 14 n.5 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)). Howards bases his contention that Petitioners admitted *Bivens* jurisdiction in this matter on a few out-of-context quotations from the district court proceedings where Petitioners referred to this matter as dealing with *Bivens*. Br. at 49. When this matter was before the district court, the Fourth Amendment retaliatory arrest claim was very much alive and well. As such,

it is axiomatic that Petitioners would have discussed *Bivens* in their filings.

B. This Court Should Not Extend *Bivens* to Reach Howards' First Amendment Claim.

This Court should not extend *Bivens* to First Amendment retaliatory arrest claims for three reasons: This Court has made a clear and consistent practice of limiting *Bivens*' reach; alternative fora existed for Howards to redress his alleged injuries; and special factors counsel against extending *Bivens* in this instance.

First, this Court has very rarely found it proper to extend *Bivens*' reach. Throughout the entire forty years of relevant jurisprudence, this Court has found an implied cause of action for damages against federal officials in only three limited circumstances. *See supra* p. 17. This is not for lack of opportunities. Rather, this Court has had many opportunities to further expand *Bivens*' reach since 1971, but has consistently refused to do so. *See, e.g., Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (refusing to extend *Bivens* for injuries related to military service); *FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (refusing to extend *Bivens* to a claim that a bank employee lost his job at a federal banking agency in violation of the Fifth Amendment's Due Process Clause); and *Chappell v. Wallace*, 462 U.S. 296, 299 (1983) (refusing to extend *Bivens* for denials of Social Security benefits).

Howards attempts to blur the lines between what this Court has and has not done. As noted *supra*,

this Court has refused to expand *Bivens* beyond three specific instances. Howards, however, repeatedly points to instances where this Court has "assume[d], without deciding, that [a] First Amendment claim is actionable under *Bivens*." Br. at 49. If such dicta stood for the proposition that there was now a fourth type of *Bivens* action, this Court would have said so in its recent *Minneci* decision, *Minneci v. Pollard*, 132 S. Ct. 617 (2012). But it did not do so. At most, these cases show this Court's willingness to proceed to other portions of the matter without explicitly deciding the question of whether to extend *Bivens*. Notably, Howards does not cite a single instance where this Court extended *Bivens* remedies to First Amendment retaliation claims.

Howards cites to this Court's decision in *Bush v. Lucas*, 462 U.S. 367 (1983), for the proposition that this Court's practice is to permit *Bivens* claims of First Amendment retaliation to proceed. Br. at 49. However, this Court has expressly disagreed with such a proposition: "In [*Lucas*], we declined to create a *Bivens* remedy against individual Government officials for a First Amendment violation . . . [and] [i]n 30 years of *Bivens* jurisprudence we have extended its holding only twice[.]" *Malesko*, 534 U.S. at 68–70.

Howards would also have this Court believe that "an individual complaining of unconstitutional selective law enforcement based on the exercise of that person's First Amendment rights is claiming a violation of the due process right to equal protection under the law[.]" Br. at 53. The important difference between an equal protection *Bivens* action

and a First Amendment *Bivens* action is that the equal protection claims are already judged by objective criteria (disparate treatment), *see supra* pp. 12–13, and Howards' proposed rule employs wholly subjective criteria.

Second, notwithstanding Howards' contention to the contrary, he had several alternative fora in which to seek redress for his alleged injury.[5] Howards claims that "[o]utside of a *Bivens* action, Howards has no vehicle to pursue a remedy for the violation of his First Amendment rights in this case." Br. at 55. This contention is directly undercut by Howards' action in this matter. Howards was able to seek redress through a Fourth Amendment *Bivens* claim. Based on a finding of probable cause, the courts below foreclosed that option. This Court's *Bivens* test does not inquire whether, after failing in several other actions, an individual has further alternative processes for seeking a remedy for an alleged injury. *See Malesko*, 534 U.S. at 71–73 (refusing to extend *Bivens* where an alternative process existed, even though that process was no longer available because it was not timely pursued). Rather, the question is whether Howards had alternative mechanisms with which to seek redress. The answer is unquestionably yes.

Third, should this Court find that the alternative processes are insufficient, there are myriad practical reasons for refusing to extend *Bivens* relief to this claim. As discussed in Petitioners' opening brief and the United States government's *amicus* brief, any benefit Howards may receive by being granted a new

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[5] *See* Brief for United States as *Amicus Curiae* at 13–15.

judicially-created forum in which to seek redress is substantially outweighed by the risks such a new rule would pose, both specifically to Petitioners, as well as more generally to similarly-situated Secret Service agents. *See, e.g.*, Brief for United States as *Amicus Curiae* at 15–21. Most notably, creating a new *Bivens* cause of action for First Amendment retaliatory arrest claims could impede a Secret Service agent's ability to effectively protect the President and Vice President.

Under Howards' proposed rule, a person who poses a direct threat to an agent's protectee may set themselves up for a future *Bivens* action by making a simple political comment as he is being arrested. In such a circumstance, Howards' rule would permit the arrestee to bring a *Bivens* suit against the agents, irrespective of the existence of probable cause. This is dangerous not only for the fact that those charged with protecting government officials might be subject to extensive and expensive litigation, but also because of the frightening possibility that an agent might hesitate to make an otherwise permissible arrest out of a fear of litigation, subjecting his protectee to potential danger.

For all these reasons, this Court should continue its practice of not extending *Bivens* relief to new causes of action.

CONCLUSION

For the foregoing reasons, as well as those set forth in Petitioners' opening brief, the judgment of the court below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-262

In the Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR., ET AL., PETITIONERS

v.

STEVEN HOWARDS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether petitioners, Secret Service agents on the Vice President's protective detail, may be personally liable for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on a claim of retaliatory arrest in violation of the First Amendment, when the arrest was supported by probable cause.

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The court of appeals held in this case that two Secret Service agents on the Vice President's protective detail may be liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory arrest in violation of the First Amendment, notwithstanding that the arrest was supported by probable cause. The United States has a substantial interest in the proper resolution of that issue. The United States Secret Service is a federal agency required by statute to protect the President and Vice President (and, if applicable, the President-elect and Vice President-elect) and authorized by statute to protect other listed persons, including certain political candidates and foreign dignitaries. 18 U.S.C. 3056(a) (2006 & Supp. IV 2010). The court of appeals' decision im-

poses potential constitutional-tort liability on agents performing those vital duties. The decision also more generally affects the constitutional standards applicable to other law-enforcement agents carrying out arrests for federal crimes. The United States filed an amicus brief at the petition stage supporting certiorari.

STATEMENT

1. This case arises out of a June 16, 2006 visit by then-Vice President Richard Cheney to a mall in Beaver Creek, Colorado. Pet. App. 3. Petitioners are Secret Service agents—Protective Intelligence Coordinator Gus Reichle and Special Agent Dan Doyle—who were assigned to guard the Vice President during that visit. *Ibid.*

Respondent, who was also at the mall that day, was arrested by the Secret Service following a physical encounter with the Vice President. Pet. App. 3-9. Respondent first came to the attention of the Vice President's Secret Service detail when Agent Doyle overheard him say into his cellphone, "I'm going to ask [the Vice President] how many kids he's killed today." *Id.* at 4 (brackets in original). Respondent was carrying a bag, and there were no metal detectors in the area. *Id.* at 8; Appellants' C.A. App. 112, 126.

Respondent waited in line to meet the Vice President, approached the Vice President, and told the Vice President that his "policies in Iraq are disgusting." Pet. App. 4-5. As respondent departed, he brought his hand into contact with the Vice President's shoulder. *Id.* at 5. Respondent characterizes the contact as "an open-handed pat," *id.* at 5 n.2, but that characterization is disputed. Other witnesses described the contact as a "'push[] off' the Vice President's shoulder," "'a get-your-attention-type touch,'" "a 'slap,'" "a 'forceful

touch,'" and "a strike that caused 'the Vice President's shoulder to dip.'" *Ibid.* (citations and brackets omitted). Agent Doyle did not overhear the conversation between respondent and the Vice President, but he did see the physical contact. *Id.* at 5.

Two other agents on the protective detail who had witnessed the incident decided that it warranted investigation by a Secret Service protective intelligence team. Pet. App. 5. Agent Reichle was dispatched to interview respondent. *Id.* at 6. Agent Reichle had neither overheard respondent's cellphone statement nor observed respondent's encounter with the Vice President, and thus relied on Agent Doyle to bring him up to speed. *Ibid.*

Respondent briefly went to another part of the mall after his encounter with the Vice President, but then returned to the area, at which point Agent Reichle approached him. Pet. App. 6. Unbeknownst to Agent Reichle, respondent was looking for his son, who had wandered off. *Ibid.* Agent Reichle presented his Secret Service badge, identified himself, and asked to speak with respondent. *Id.* at 7. Respondent refused. *Ibid.* Agent Reichle then stepped in front of respondent and asked respondent if he had assaulted the Vice President. *Ibid.* Respondent pointed his finger at Agent Reichle, denied assaulting the Vice President, and said, "if you don't want other people sharing their opinions, you should have [the Vice President] avoid public places." *Ibid.* (brackets in original). According to respondent, Agent Reichle became "visibly angry" when respondent voiced his opinion about the war in Iraq. *Ibid.*

Agent Reichle asked respondent whether he had touched the Vice President. Pet. App. 7. Respondent falsely stated that he had not. *Ibid.* Agent Reichle

asked nearby agents whether they had witnessed the incident. *Id.* at 8. Agent Doyle confirmed that he had witnessed it and performed a demonstration (the accuracy of which is disputed) of petitioner's physical contact with the Vice President. *Id.* at 8 & n.3.

Based upon respondent's "premeditation, the conversation on the cell phone, the fact that [respondent] would not talk to [him], the fact that he's walking around with a bag in his hand in an unmagged [no metal detector] area, and the fact that [Agent Doyle told him] that [respondent] had unsolicited contact," Agent Reichle decided to arrest respondent for assaulting the Vice President. Pet. App. 8 (second and third sets of brackets in original). Agent Doyle and other agents assisted in restraining respondent during the arrest. *Ibid.* Respondent was turned over to local law enforcement and detained for several hours. *Ibid.* He was charged with state-law harassment, but the charges were later dismissed. *Id.* at 8-9.

2. Respondent filed a suit against petitioners and other Secret Service agents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that he had been arrested unlawfully and seeking money damages. Pet. App. 9. He claimed that his arrest violated the Fourth Amendment, because the agents lacked probable cause to believe he had committed a crime. *Ibid.* He also claimed that the arrest violated the First Amendment, because the agents arrested him in retaliation for his protected speech. *Ibid.* Petitioners and the other defendants moved for summary judgment, which the district court denied. *Ibid.*; see *id.* at 48-57.

3. The court of appeals reversed in part and affirmed in part. Pet. App. 1-43. The court concluded that

respondent's Fourth Amendment claim should have been dismissed because, even "[r]eviewing the facts through [respondent's] lens, there was probable cause to arrest him for a suspected violation of" 18 U.S.C. 1001, which prohibits making a materially false statement to a federal officer in a matter that falls within the jurisdiction of the federal government. Pet. App. 17. The court observed that respondent himself had conceded during his deposition that he had lied to Agent Reichle about whether he had touched the Vice President. *Id.* at 18-19. Because the court found that there was probable cause to arrest respondent for violating Section 1001, the court did not reach the question whether there was probable cause to arrest him for other offenses, such as assault on the Vice President (18 U.S.C. 1751(e)). Pet. App. 17 n.7.

The court of appeals concluded, however, that respondent's First Amendment retaliatory-arrest claim against petitioners could proceed to trial. Pet. App. 22-36. The court believed that respondent had made out a First Amendment claim against petitioners because (1) respondent had engaged in protected speech; (2) arrest is an injury that would tend to chill speech; and (3) the facts, taken in the light most favorable to respondent, "suggest[ed]" that petitioners (although not the other defendants) "may have been substantially motivated by [respondent's] speech when [respondent] was arrested." *Id.* at 23-26; see *id.* at 36-39 (concluding that the remaining defendants were entitled to qualified immunity on respondent's First Amendment claim).

The court rejected petitioners' argument that the existence of probable cause for the arrest defeated respondent's retaliatory-arrest claim. The court of appeals recognized that, under this Court's decision in *Hartman* v. *Moore*, 547 U.S. 250 (2006), a plaintiff must

plead and prove the absence of probable cause in order to maintain a First Amendment claim seeking damages for retaliatory *prosecution*. Pet. App. 29-31. It also recognized that several courts of appeals, both before and after *Hartman*, have applied a similar rule in the context of a First Amendment claim seeking damages for retaliatory arrest. *Id.* at 29, 31-32. But the court of appeals disagreed with those decisions and declined to apply *Hartman* in the context of retaliatory arrests, reasoning that retaliatory-arrest claims meaningfully differ from retaliatory-prosecution claims. *Id.* at 31-33. The court additionally refused to grant petitioners qualified immunity, *id.* at 35-36, concluding that the law on this issue was clearly established by pre-*Hartman* circuit precedent, *id.* at 34 n.14.

Judge Kelly concurred in part and dissented in part. Pet. App. 40-43. He would have held that petitioners enjoyed qualified immunity from the retaliatory-arrest claim, because, "when the arrest in this case occurred, the law simply was not clearly established (nor is it now) that *Hartman* only applied to retaliatory prosecutions and not retaliatory arrests." *Id.* at 41. He stated that there "is a strong argument" that *Hartman*'s absence-of-probable-cause requirement applies in both contexts, and he emphasized the existence of a circuit conflict on the issue. *Id.* at 40.

SUMMARY OF ARGUMENT

Petitioners arrested respondent in the course of carrying out their critical statutory obligation to protect the Vice President. Not only was the arrest supported by probable cause, but respondent did, in fact, commit a federal crime by lying to federal agents about his physical contact with the Vice President. The court of appeals erred in concluding that petitioners should never-

theless face the prospect of personal damages liability under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), based on respondent's allegation that his otherwise-lawful arrest was undertaken in retaliation against him for his expression of political views.

I. As a threshold matter, the Court should decline to authorize judicially-created damages claims under *Bivens* against individual federal officers by plaintiffs alleging that they were arrested in retaliation for expressive conduct. For over 30 years, this Court has repeatedly declined to extend the scope of *Bivens* actions beyond the circumstances of the original trio of cases in which such actions were first recognized. The considerations that have motivated the Court's consistent refusal to extend *Bivens*—the existence of alternative remedies and "special factors counselling hesitation" in judicial, rather than congressional, lawmaking, *Minneci* v. *Pollard*, No. 10-1104 (Jan. 10, 2012), slip op. 3-4 (citation omitted)—are equally, if not more, forceful here.

Multiple potential remedies are already available to a plaintiff who believes he has been unlawfully arrested by a federal officer. In addition to his ability to defend himself in any criminal proceedings that result from the arrest, he can bring a Fourth Amendment *Bivens* claim, and might potentially be able to bring an equal-protection *Bivens* claim—including a claim alleging that he was treated differently from similarly situated people based on his expressive activity. Allowing such a plaintiff also to bring a *Bivens* claim alleging that his arrest was motivated by retaliation for protected speech would come at the high cost of exposing officers to unpredictable liability and deterring legitimate law enforcement. Unlike suits based on the Fourth Amendment or equal-

protection principles, both of which rely on objective evidence (of probable cause or of differential treatment of similarly situated people), a First Amendment retaliatory-arrest suit will typically turn on a jury's subjective assessment of the credibility of an officer's testimony about his motivation for the arrest. Trial will therefore be difficult to avoid, and the outcome will be uncertain. The upshot will be that even officers with no bad intentions might refrain from carrying out otherwise lawful arrests in circumstances in which they might later be alleged to have acted in retaliation against expressive activity.

Such situations are all too common for Secret Service agents like petitioners, who perform the vital function of protecting the safety of political figures and who often must make split-second judgments in highly charged environments (speeches, protests, etc.) marked by a range of expressive activity. Even if the Court were to authorize retaliatory-arrest *Bivens* claims in certain circumstances, courts lack the necessary institutional resources to reliably tailor appropriate remedies in the field of Secret Service protection.

II. Even assuming that *Bivens* authorizes respondent's retaliatory-arrest claim against petitioners, that claim should fail because respondent's arrest was supported by probable cause.

A. This Court held in *Hartman* v. *Moore*, 547 U.S. 250 (2006), that a *Bivens* plaintiff who alleges that federal agents induced his prosecution in retaliation for expressive activity must plead and prove the absence of probable cause. The Court emphasized the difficulty of determining the cause of a particular prosecution, and concluded that making the absence of probable cause an element of the claim is an efficient method of requiring

a plaintiff to demonstrate a likelihood that his prosecution was caused by retaliatory animus as opposed to legitimate law-enforcement objectives.

Similar considerations apply to retaliatory-arrest claims like this one. As in the retaliatory-prosecution context, it is much less likely that the decision to arrest a plaintiff was caused by retaliatory animus when the action was objectively justified by probable cause. And as in the retaliatory-prosecution context, proof of the absence of probable cause provides a necessary objective anchor for what would otherwise be an overly complex inquiry into causation. The causation inquiry is particularly complicated in retaliatory-arrest cases because an officer will often have entirely legitimate reasons for taking speech into account in deciding whether to effect an arrest. A suspect's explanation of his conduct, statement of future intent to violate the law, or other expressive activity may properly play a role in determining whether an arrest would be a useful investment of limited law-enforcement resources. In this case, for example, petitioners reasonably took account of respondent's statements as part of the totality of the circumstances in assessing whether an arrest was warranted to protect the Vice President's safety. Probable-cause evidence will be extremely helpful in sorting out whether an officer's speech-related considerations in the arrest context were legitimate, and requiring such evidence adds at most a negligible burden on the plaintiff.

Guidance from the common law, which often plays a role in shaping the parameters of constitutional-tort actions, also counsels in favor of recognizing a no-probable-cause requirement for retaliatory-arrest cases, at least when the arrest was made without a warrant. An officer who makes a warrantless arrest supported by

probable cause would generally be protected from damages liability at common law, even if he harbored a retaliatory motive. There is no sound reason for exposing officials to greater liability under the First Amendment.

B. Even if federal officers may in some circumstances face *Bivens* liability for arrests supported by probable cause, petitioners should at the very least receive qualified immunity from respondent's claims. Reasonable officers in petitioners' position could have concluded, as multiple courts of appeals have, that a probable-cause-supported arrest would not violate the First Amendment.

ARGUMENT

I. THIS COURT SHOULD DECLINE TO EXTEND *BIVENS* TO FIRST AMENDMENT CLAIMS ALLEGING RETALIATORY ARREST

A. This Court Has Never Authorized First Amendment Retaliatory-Arrest Claims Against Individual Federal Officers

This Court has recognized an implied cause of action for damages against a federal official alleged to have violated the Constitution in only three circumstances. First, in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that federal law-enforcement officers may face personal monetary liability for participating in a search or seizure that violates the Fourth Amendment. Next, in *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court extended *Bivens* to permit a damages suit against a Congressman for gender discrimination in violation of the Due Process Clause of the Fifth Amendment. Finally, in *Carlson* v. *Green*, 446 U.S. 14 (1980), the Court permitted a *Bivens* claim against individual federal prison

officials for an alleged violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.

In the three decades since *Carlson*, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001); see *Minneci* v. *Pollard*, No. 10-1104 (Jan. 10, 2012), slip op. 1, 5-6. The Court has explained that *Bivens* was a product of its "previous willingness to imply a cause of action where Congress has not provided one." *Malesko*, 534 U.S. at 67 n.3. In light of its more recent jurisprudence recognizing that "implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1948 (2009). The Court has, for example, disapproved *Bivens* claims for injuries arising out of military service, see *United States* v. *Stanley*, 483 U.S. 669 (1987); *Chappell* v. *Wallace*, 462 U.S. 296 (1983); denials of Social Security disability benefits, see *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); and retaliation against the exercise of ownership rights, see *Wilkie* v. *Robbins*, 551 U.S. 537 (2007). The Court has recognized that Congress "is in a far better position than a court" to make policy judgments about whether a damages remedy is warranted and what the scope of that remedy should be. *Id.* at 562 (citation omitted).

This Court has never authorized a *Bivens* action of the type that respondent asserts here. Although the Court has on occasion heard cases that involve damages suits against federal officers based on First Amendment violations, it has never expressly held that *Bivens* extends to such claims. See *Iqbal*, 129 S. Ct. at 1948 ("[W]e assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*.");

Hartman, *supra* (containing no discussion of whether *Bivens* extends to First Amendment retaliatory-prosecution claims). Indeed, in the only case in which the Court has squarely confronted the issue, which involved a federal employee's claim that he had been demoted in retaliation for his speech, the Court "declined to extend *Bivens* to a claim sounding in the First Amendment." *Iqbal*, 129 S. Ct. at 1948 (discussing *Bush* v. *Lucas*, 462 U.S. 367 (1983)); see *Minneci*, slip op. 5 (similar).

B. Extending *Bivens* To First Amendment Retaliatory-Arrest Claims Is Unwarranted

The Court should similarly decline to extend *Bivens* to the First Amendment retaliatory-arrest claim raised by respondent here. Although the specific issue of the availability of a *Bivens* cause of action was not addressed below, it is logically antecedent to the question presented, and the Court has jurisdiction to decide it. See *Wilkie*, 551 U.S. at 549 n.4; *Carlson*, 446 U.S. at 17 n.2. Petitioners argue (Pet. Br. 53-55) that the Court should decline to extend *Bivens* to the First Amendment claim at issue. Compare *Iqbal*, 129 S. Ct. at 1948 ("assum[ing], without deciding, that respondent's First Amendment claim is actionable under *Bivens*" because "[p]etitioners do not press this argument"). Resolution of this threshold issue, which could obviate the need to determine the precise contours of claims like respondent's, would further the interest of judicial economy. See *Carlson*, 446 U.S. at 17 n.2 (concluding that "the interests of judicial administration will be served" by addressing viability of *Bivens* action, even though not raised in the lower courts). And it would also provide useful guidance to lower courts. See, *e.g.*, *Air Sunshine, Inc.* v. *Carl*, 663 F.3d 27, 35 (1st Cir. 2011) (questioning

whether *Bivens* extends to First Amendment retaliation claims).

The test for determining whether to extend *Bivens* to a new context "may require two steps." *Minneci*, slip op. 3 (quoting *Wilkie*, 551 U.S. at 550). First, "there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Ibid.* (quoting *Wilkie*, 551 U.S. at 550). Second, "even in the absence of such an alternative, a *Bivens* remedy is a subject of judgment: the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation," including deference to the institutional advantages Congress enjoys in addressing questions of policy, "before authorizing a new kind of federal litigation." *Id.* at 3-4 (quoting *Wilkie*, 551 U.S. at 550); see *Wilkie*, 551 U.S. at 562. Here, those factors militate against adding a new branch to *Bivens*.

1. Multiple remedies are potentially available to someone who believes that he has been arrested in retaliation for the exercise of his First Amendment rights. To begin with, this Court's decision in *Wilkie* v. *Robbins* indicates that in cases where an arrest leads to a criminal charge, the opportunity to defend against that charge in court constitutes an alternative remedy for *Bivens* purposes, because it provides a "means to be heard." 551 U.S. at 552. The plaintiff in *Wilkie* (Robbins) claimed, analogously to respondent here, that the government was vindictively bringing administrative and criminal charges against him in retaliation for his assertion of his property rights. *Id.* at 543-546 (noting

allegation that an agency employee "was told by his superiors to 'look closer' and 'investigate harder' for possible trespasses and other permit violations by Robbins"); see *id.* at 551. Because Robbins had been able to contest those charges either in agency proceedings or in court (at a jury trial on the criminal charges), the Court was satisfied that "[f]or each charge, * * * Robbins had some procedure to defend and make good on his position." *Id.* at 552.

In addition to his ability to defend himself in any criminal proceedings—and in addition to any remedies he may have against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1)—someone who believes that federal officers have made a retaliatory arrest may have one or more damages claims against those officers based on the categories of *Bivens* actions that this Court already has recognized. See *Wilkie*, 551 U.S. at 551 (recognizing that tort suits constitute an alternative remedy for *Bivens* purposes); *Malesko*, 534 U.S. at 72-74 (same). First, *Bivens* itself would authorize a damages suit for a Fourth Amendment violation, such as an arrest without probable cause. See 403 U.S. at 396. Second, although the Court has never addressed the issue and it is not presented here, it is possible that the Court might conclude that *Davis* v. *Passman* provides a cause of action for at least some plaintiffs who allege that their arrests violated equal-protection principles. Such a claim could permit a plaintiff to recover damages based on proof that an officer made unlawful distinctions between similarly situated people in making arrest decisions—such as, potentially, distinctions based on the exercise of First Amendment rights. See *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972) (noting that claim of discrimination in viola-

tion of the Equal Protection Clause was "closely intertwined with First Amendment interests"); see also *United States* v. *Armstrong*, 517 U.S. 456, 464-470 (1996) (emphasizing that equal-protection claims in the law-enforcement context require proof that similarly situated people were treated differently).

2. Regardless of the availability of preexsisting remedies, there are significant "special factors counselling hesitation," *Minneci*, slip op. 3-4 (citation omitted), in authorizing a First Amendment-based damages claim against an individual federal officer for an allegedly retaliatory arrest. Any potential benefit of extending *Bivens* is substantially outweighed by the practical problems that such an extension would create.

The benefit would be limited because the remedies discussed above would provide significant protections for First Amendment concerns, even in the absence of a retaliatory-arrest *Bivens* claim. See *Malesko*, 534 U.S. at 70 (recognizing that a deterrent is "adequate[] * * * for *Bivens* purposes no matter that [the federal officers] may enjoy qualified immunity, are indemnified by the employing agency or entity, or are acting pursuant to an entity's policy") (citation omitted). As a threshold matter, insofar as the Court might conclude that officers are subject to equal-protection *Bivens* claims in the arrest context, plaintiffs could raise a claim of speech-related discrimination through that framework, see *Mosley*, 408 U.S. at 95, and thereby vindicate largely the same constitutional principles that a First Amendment claim would.

The Court has also recognized an overlap between the First Amendment and the Fourth Amendment. In *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), for example, the Court rejected the argument that First

Amendment concerns require the application of special procedures, above and beyond the Fourth Amendment's protections, when police seek to search a newspaper's offices. *Id.* at 563-567. The Court stated that, "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." *Id.* at 565.

Although *Zurcher* focused on warrants, it is similarly true that the Fourth Amendment's requirement of probable cause as a prerequisite to an arrest imposes a significant limitation on any use of the arrest power to suppress expressive activity. An officer cannot simply arrest anyone whose speech displeases him; rather, he may lawfully arrest a suspect only when the circumstances, "'viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause" to believe the suspect has committed a crime. *Maryland* v. *Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996)). That standard "protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" *Id.* at 370 (quoting *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949)).

Even assuming there were a significant public benefit in deterring arrests not actionable on other grounds, fashioning a retaliatory-arrest tort under *Bivens* would come at too high a cost. Such a tort would tend to deter legitimate law-enforcement conduct, because officers will lack reliable criteria for determining when they might be liable. Absent an extension of *Bivens* to First

Amendment claims alleging retaliatory arrests, an officer deciding whether to arrest someone has all of the information he needs to make a reasonably accurate assessment of whether he may face *Bivens* liability for doing so. The Fourth Amendment analysis of probable cause depends upon a purely objective evaluation of the circumstances surrounding the arrest. See, *e.g.*, *Whren* v. *United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). And insofar as arrests may be held to give rise to equal-protection *Bivens* claims, an equal-protection analysis would depend upon objective evidence that the officer treated other similarly situated persons differently. *Armstrong*, 517 U.S. at 465-470.

By contrast, the retaliatory-arrest tort contemplated by the court of appeals in this case lacks any such objective anchor that would enable the officer to predict his future liability. Instead, the critical factor for determining liability would be the jury's after-the-fact assessment of the officer's subjective motivation for making the arrest. Pet. App. 22-23. That factor is inherently unknowable to the officer. Even if the officer is making the arrest for legitimate reasons, he may worry that circumstantial evidence would cause a jury to think otherwise. There might, for example, be a history of animosity between the officer and the suspect; the suspect might argue with the officer during the encounter; or (as in this case) probable cause may arise while the suspect is engaged in expressive activity. Indeed, a suspect who wishes to deter arrest or lay the groundwork for a lawsuit can do so simply by, for example, directing an anti-police slur at the officer before the arrest in the hopes of making the officer angry.

Under the court of appeals' decision, an officer in those circumstances would face an unpleasant choice between, on one hand, forgoing the arrest and, on the other, inviting litigation by carrying it out. If he elects the latter, and is sued, trial will be difficult to avoid. "Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (internal quotation marks and citation omitted). Even the qualified-immunity doctrine would provide little useful protection. An official receives such immunity only if his conduct "does not violate clearly established statutory or constitutional rights about which a reasonable person would have known." *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (citation omitted). If this Court were to clearly establish a rule that retaliatory arrests like the one alleged here violate the First Amendment, then there would be little work for the qualified-immunity doctrine to do, and retaliatory-arrest cases like this would turn on a purely factual inquiry into the credibility of an officer's testimony about a non-retaliatory motive.

There is no sound policy reason why plaintiffs unable to make out an objective case under the Fourth Amendment—or, potentially, equal-protection principles—should nonetheless be permitted to subject federal officers to lengthy and unpredictable litigation about their subjective motivations. Cf. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (observing that Fourth Amendment's objective focus "promotes even-handed, uniform enforcement of the law"). The interests of public safety would be ill-served by recognizing a tort

that could cause officers to shy away from making legitimate arrests simply because the background context involves expressive activity.

3. The considerations counseling hesitation before recognizing a *Bivens* remedy apply with particular force where, as here, the protective functions of the Secret Service are at issue. This Court has previously limited the scope of *Bivens* not only by declining to recognize certain types of substantive claims, but also by declining to allow suit against certain categories of defendants. See *Malesko*, 534 U.S. at 63; *FDIC* v. *Meyer*, 510 U.S. 471, 484-486 (1994); see also *Minneci*, slip op. 7-8 (recognizing that "the nature of the defendant" can bear on the propriety of recognizing *Bivens* liability). Even if the Court believes that retaliatory-arrest liability under *Bivens* may be appropriate in certain circumstances, it should nevertheless hold that such claims cannot be brought against Secret Service agents engaged in their vital protective duties.

Secret Service agents frequently operate in politically-charged environments. They protect not only the President and Vice President, 18 U.S.C. 3056(a)(1), but also other political figures such as foreign heads of state (and, potentially, other foreign dignitaries), 18 U.S.C. 3056(a)(5)-(6), as well as presidential and vice-presidential candidates, 18 U.S.C. 3056(a)(7). They also sometimes provide security at "special events of national significance," 18 U.S.C. 3056(e)(1), which can include political activities like major-party presidential nominating conventions. There is accordingly a high likelihood that, as in this case, the circumstances surrounding an arrest or detention will involve expressive activity. See, *e.g.*, *Saucier* v. *Katz*, 533 U.S. 194, 197-198 (2001) (*Bivens* claim against military policeman by political

protester detained at rally where Vice President was scheduled to appear), overruled in part on other grounds by *Pearson* v. *Callahan*, 555 U.S. 223 (2009); *McCabe* v. *Parker*, 608 F.3d 1068, 1070-1073 (8th Cir. 2010) (*Bivens* claim against Secret Service agents by political protester arrested at rally where President was scheduled to appear).

Secret Service agents in these situations are performing a critically important public function. Cf. *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam) ("The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive."). This Court has recognized that when a person presents a potential threat to the Vice President, an officer guarding the Vice President is "required to recognize the necessity to protect the Vice President by securing [the person] and restoring order to the scene." *Saucier*, 533 U.S. at 208. In taking such action to ensure a protected individual's safety, agents "should not err always on the side of caution because they fear being sued." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (internal quotation marks and citation omitted).

Those considerations counsel against courts' recognition of a judicially-implied cause of action in this area. Courts are not well positioned to predict with the necessary degree of precision the impact of recognizing liability on the primary conduct of agents in the field, or to fine-tune any available remedies to assure that important public-safety goals are not unduly compromised. Rather, "Congress is in a far better position than a court to evaluate the impact of a new species of litigation against those who act on the public's behalf" and "can tailor any remedy to the problem perceived." *Wilkie*, 551 U.S. at 562 (internal quotation marks and citation

omitted). In such circumstances, the Court should decline to recognize a *Bivens* claim.

II. THE COURT OF APPEALS ERRED IN PERMITTING RESPONDENT'S RETALIATORY-ARREST CLAIM DESPITE THE PRESENCE OF PROBABLE CAUSE

Even assuming that *Bivens* authorizes a private damages claim alleging that a law-enforcement officer arrested a suspect for retaliatory reasons, the court of appeals erred in concluding that such a claim may proceed even when probable cause supported the arrest. This Court has previously held that the presence of probable cause defeats a First Amendment retaliatory-prosecution claim, and similar considerations dictate that it should also defeat a First Amendment retaliatory-arrest claim. At the very least, petitioners should receive qualified immunity, because a reasonable officer could have believed that an arrest supported by probable cause does not violate the First Amendment.

A. A Plaintiff Raising A First Amendment Retaliatory-Arrest Claim Should Be Required To Plead And Prove The Absence Of Probable Cause

1. In *Hartman* v. *Moore*, the Court addressed the requirements for a plaintiff to prevail on a *Bivens* claim alleging that criminal investigators had violated the plaintiff's First Amendment rights by inducing a criminal prosecution in retaliation for his protected speech. The Court (without addressing whether *Bivens* extends to such a claim in the first place) held that the plaintiff must plead and prove the absence of probable cause. 547 U.S. at 252.

The Court noted that, while "retaliatory actions * * * for speaking out" are constitutionally forbidden "as a general matter," *Hartman*, 547 U.S. at 256, a

plaintiff in a retaliation case must show that retaliation was the "but-for cause" of the official's action. *Id.* at 256, 260. As the Court explained, "[i]t may be dishonorable to act with an unconstitutional motive and perhaps in some instances be unlawful, but action colored by some degree of bad motive does not amount to a constitutional tort if that action would have been taken anyway." *Id.* at 206; see *Wilkie*, 551 U.S. at 558 n.10 (rejecting the proposition that "the presence of malice or spite in an official's heart renders any action unconstitutionally retaliatory, even if it would otherwise have been done" for legitimate reasons). And the Court reasoned that "the need to prove a chain of causation from animus to injury, with details specific to retaliatory-prosecution cases, * * * provides the strongest justification for [a] no-probable-cause requirement" in the context of a constitutional-tort claim alleging retaliatory prosecution. *Hartman*, 547 U.S. at 259.

The Court identified two primary features of retaliatory-prosecution cases that distinguish them from "standard" retaliation cases, *Hartman*, 547 U.S. at 260, and that support a requirement to prove an absence of probable cause. First, the Court observed that in retaliatory-prosecution cases, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Id.* at 261. "Demonstrating that there was no probable cause for the underlying criminal charge," the Court explained, "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution." *Ibid.* Conversely, "establishing the existence of probable cause will suggest that prose-

cution would have occurred even without a retaliatory motive." *Ibid.* The Court reasoned that the issue "is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense." *Id.* at 265.

Second, the Court observed that "the requisite causation between the defendant's retaliatory animus and the plaintiff's injury" in a retaliatory-prosecution case "is usually more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. "A *Bivens* (or § 1983) action for retaliatory prosecution," the Court noted, "will not be brought against the prosecutor, who is absolutely immune," but instead against a non-prosecutor official "who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 261-262. "Thus," the Court explained, "the causal connection required [in such a suit] is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person [the investigator] and the action of another [the prosecutor]," *ibid.*, whose prosecutorial decisions, moreover, would be entitled to a "presumption of regularity," *id.* at 263. Proof of the absence of probable cause would provide an evidentiary "link" to "bridge [that] gap," *ibid.*, in that the absence (or presence) of probable cause would have "obvious evidentiary value" in assessing whether the non-prosecutor official's retaliatory animus induced the prosecutor's charging decision, *id.* at 265.

2. The court of appeals erred in deeming *Hartman* inapplicable to this case. Retaliatory-arrest cases, like retaliatory-prosecution cases, are materially distinct from "standard" retaliation cases in the same two respects emphasized by the Court in *Hartman*. First,

retaliatory-arrest cases likewise will present "a distinct body of highly valuable circumstantial" probable-cause evidence that is "apt to prove or disprove retaliatory causation." 547 U.S. at 261. As in retaliatory-prosecution cases, the issue of probable cause is "likely to be raised by some party at some point" in a retaliatory-arrest case, and it would impose little, if any, practical burden to require a plaintiff to demonstrate its absence. *Id.* at 265. And as in retaliatory-prosecution cases, demonstrating "that there was no probable cause for the [arrest] will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for" the arrest, whereas "establishing the existence of probable cause will suggest that [the arrest] would have occurred even without a retaliatory motive." *Id.* at 261.

Second, in retaliatory-arrest cases, as in retaliatory-prosecution cases, the retaliation inquiry "is usually more complex than it is in other retaliation cases," thus "support[ing] a requirement that no probable cause be alleged and proven." *Hartman*, 547 U.S. at 261. As a threshold matter, a number of retaliatory-arrest cases will involve the same specific complexity present in *Hartman*: a lack of identity between the defendant alleged to have a retaliatory motive and the official who decided to take the challenged action. See *id.* at 262. Respondent's suit against Agent Doyle is an example: Agent Reichle made the decision to arrest respondent, Pet. App. 8, and the claim against Agent Doyle appears to be premised on the theory that Agent Doyle induced the decision to arrest. If respondent had brought a retaliatory-prosecution claim asserting that Agent Doyle's allegedly retaliatory animus induced the prosecutor to bring the charges that were filed against him, *ibid.*, *Hartman* indisputably would require respondent

to plead and prove the absence of probable cause. It would be incongruous to permit respondent to proceed on a retaliatory-arrest claim similarly premised on Agent Doyle's allegedly retaliatory animus without any need to demonstrate the absence of probable cause. See *Hartman*, 547 U.S. at 262-263 (citing cases raising challenges to prosecutions based on inducement of police officers).

More fundamentally, even when only a single officer's actions are at issue, the causation inquiry in arrest cases—as in prosecution cases—will still "usually [be] more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. For instance, in the case of a standard retaliation claim by a public employee "that he was fired for speech criticizing the government," *id.* at 259, a close temporal proximity between the plaintiff's expressive activity (say, a letter to a newspaper editor) and the adverse governmental action will typically provide at least some support for the plaintiff's prima facie claim of unlawful retaliation, see *id.* at 259-260. The same is not true in the arrest context. Rather, a suspect's expressive activity will often be an entirely legitimate, or even necessary, factor for the officer to take into account in deciding whether to make an arrest.

In some cases, expressive activity may provide evidence of a crime and thus bear directly on the probable-cause determination. See, *e.g.*, *Hunter*, 502 U.S. at 228 (considering suspect's statements in addressing probable cause to arrest him for threatening the President); *Wayte* v. *United States*, 470 U.S. 598, 612-613 (1985) (noting that protest letters written to the Selective Service "provided strong, perhaps conclusive evidence" of an element of the criminal offense of failing to register for the draft). Even more frequently, expressive activity

will be relevant to an officer's decision concerning whether an arrest would make sense under the circumstances. Officers do not—and could not—take into custody every person whom they could lawfully arrest, and there is accordingly a "well established tradition of police discretion" in deciding whether a custodial arrest is warranted. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760 (2005); see also *Chicago* v. *Morales*, 527 U.S. 41, 62 n.32 (1999) (observing that it is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances"). The Court has never held that officers are forbidden from considering a suspect's expressive activity in making that discretionary decision, nor would such a rule be sensible. Cf. *Wayte*, 470 U.S. at 614 (rejecting interpretation of the First Amendment that "would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law").

In deciding whether to arrest someone for trespassing on government property, for example, an officer should be able to consider that a suspect who belligerently states, "the government has no right to own property," is less likely to leave promptly of his own accord than a suspect who immediately apologizes and explains that he was simply taking a shortcut home. Similarly, in this case, it was both legitimate and prudent for petitioners to take account of respondent's vocal criticism of the Vice President as part of the totality of circumstances in assessing whether respondent presented a threat to the Vice President and should be arrested and removed from the area. Secret Service agents can reasonably, and lawfully, conclude that someone whose disagreement with the Vice President has already led to

unsolicited physical contact presents more of a security risk than someone who, for example, bumped into the Vice President accidentally. See Pet. App. 8 (Agent Reichle's testimony that he arrested respondent based upon his "premeditation, the conversation on the cell phone, the fact that [respondent] would not talk to [him], the fact that he's walking around with a bag in his hand in an [area without a metal detector], and the fact that [Agent Doyle said] that he had unsolicited contact" with the Vice President).

It will often be quite difficult, however, for judges and juries to distinguish permissible arrest-related consideration of expressive activity from retaliation. An officer's honest admission that expressive activity played a part in his arrest decision can easily be used against him. Indeed, the court of appeals in this case construed such an admission by Agent Reichle as evidence supporting an inference of retaliation. Pet. App. 26. This complexity in establishing causation renders the reasoning of *Hartman* fully applicable to retaliatory-arrest cases.

As in *Hartman*, the complexity "should be addressed specifically in defining the elements of the tort," 547 U.S. at 265, because the jury (and the district court, when it addresses a dispositive motion) will otherwise lack any consistent, objective criterion for distinguishing lawful from unlawful government action. As the Court explained in *Hartman*, "[b]ecause showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case." *Id.* at 265-266. And also as in *Hartman*, the Court should make that requirement a blanket rule for all retaliatory-arrest cases (including those that may not

present the same degree or kind of causal complexity as this one), rather than invite difficult line-drawing problems about which cases are sufficiently complex to necessitate it. *Id.* at 261, 264 & n.10. Indeed, a probable-cause standard would have significant benefits even in relatively straightforward cases, because it provides a well-established and easily administrable way of striking the appropriate balance between the interest in protecting individuals from unreasonable law-enforcement interference and the public-safety interest in enabling officers to enforce the law. *E.g.*, *Pringle*, 540 U.S. at 370.

3. This case, moreover, presents an additional consideration, not present in *Hartman*, that counsels in favor of requiring a plaintiff to plead and prove the absence of probable cause: the common law's reliance on that factor in analogous contexts. The Court has recognized that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights," and that those preexisting rules are often useful in defining the contours of constitutional torts. *Carey* v. *Piphus*, 435 U.S. 247, 257-258 (1978); see *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994). The Court accordingly acknowledged in *Hartman* that the common law can at least serve "as a source of inspired examples" in the *Bivens* context. 547 U.S. at 258. In that case, however, the Court found no clear guidance from the common law, observing that "we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it)." *Ibid.*

But at least for retaliatory-arrest cases that, like this one, do not involve a warrant, the common-law analogue is much clearer. A warrantless arrest would not provide the basis for a common-law abuse-of-process claim, because it does not involve legal "process," which generally is defined to require some sort of interaction with a court. See Restatement (Second) of Torts § 682 (1977) (element of abuse-of-process torts is "us[ing] a legal process") (Second Restatement); *Black's Law Dictionary* 1085 (5th ed. 1979) (defining "legal process" to mean "a summons, writ, warrant, mandate, or other process issuing from a court" and defining "criminal process" by reference to a warrant); see also 3 Dan B. Dobbs et al., *The Law of Torts* § 594, at 420-422 (2d ed. 2011) (discussing definition of "process" in context of abuse-of-process tort) (Dobbs). Rather, a warrantless arrest might be actionable at common law in one of two ways. First, the arrestee might allege that there was no legal authority to arrest him, in which case his claim would be for false imprisonment. Second Restatement §§ 35, 41 (1965), 654 cmt. e; see also Dobbs § 41, at 104. Second, the arrestee might allege that even if there was legal authority to arrest him, that authority was invoked maliciously, in which case his claim would be for malicious prosecution. Second Restatement § 654 cmt. e.

Neither common-law option would generally impose damages liability on an officer who made a warrantless arrest based on probable cause. The absence of probable cause is an element of a malicious-prosecution tort. Second Restatement § 653; see, *e.g.*, *Hartman*, 547 U.S. at 258; *Heck*, 512 U.S. at 485 n.4. And the presence of probable cause is a defense to a false-imprisonment tort. A defendant in a false-imprisonment case can avoid liability by showing that he made a "privileged" arrest,

Second Restatement § 118 & cmt. b (1965); Dobbs § 94, at 289-290, and a "peace officer" would be privileged to arrest someone whom he "reasonably suspects" has committed a felony or who breaches the peace in his presence. Second Restatement §§ 114, 119(b)-(c), 121(a)-(b) (1965); see also Dobbs § 94, at 291-293.*

Any retaliatory motive that an officer might have in making a warrantless arrest would typically be irrelevant if probable cause were present. It has long been the rule that "if there was probable cause, an action for malicious prosecution will not lie, although the party who procured the arrest or indictment was actuated by malicious motives." *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1851); see also 3 William Blackstone, *Commentaries* 127 (1768). And in the false-imprisonment context, "the fact that [an officer] has an ulterior motive * * * does not make the arrest unprivileged" so long as the arrest is made in the course of enforcing the law (and not, say, simply to pressure the suspect into performing a service for the officer as a condition of release). Second Restatement § 127 cmt. a (1965). So, for example, if "A, a traffic officer, arrests B for driving at

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* The common-law rule arguably could be read to require that the officer subjectively intend to arrest the suspect for the specific crime for which probable cause objectively existed. This Court has, however, rejected such a requirement in the Fourth Amendment context. See *Devenpeck* v. *Alford*, 543 U.S. 146 (2004). And even if such a requirement applied here, petitioners would still be shielded from liability, because respondent's unsolicited physical contact with the Vice President provided probable cause for the assault crime that petitioners had in mind when they arrested him. See Pet. App. 8; 18 U.S.C. 1751(e) (criminalizing an "assault[]" on the Vice President); Wayne R. LaFave, *Criminal Law* §§ 16.2-16.3, at 816, 823 (4th ed. 2003) (traditional definition of "assault" includes "attempted battery," and traditional definition of "battery" includes "offensive touching").

the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour," the arrest is privileged (and thus no false-imprisonment liability attaches), even if A made the arrest "because B was a personal enemy, or because B had previously reported him for his failure to arrest persons driving at 25 miles an hour." *Id.* § 127 cmt. a, illus. 1 (1965).

Under the court of appeals' decision, however, a plaintiff in those circumstances could impose liability on the officer by couching his claim in constitutional terms. There is no reason why the definition of the constitutional tort should so sharply depart from the common law's guidance. Particularly in light of *Hartman*'s causation-related considerations, it makes sense to incorporate the probable-cause inquiry in the constitutional context not merely as an affirmative defense (as it is for false imprisonment), but as an element of the claim (as it is for malicious prosecution). The same practical considerations that have informed the development of the common law are equally present here. See *Heck*, 512 U.S. at 483. And requiring consideration of probable cause at the earliest possible stage of the case protects innocent officers to the maximum extent from the burdens of discovery and trial. See *Iqbal*, 129 S. Ct. at 1945-1947.

B. At A Minimum, Petitioners Are Entitled To Qualified Immunity Because They Reasonably Could Have Believed Their Conduct Was Lawful

Not only did the court of appeals err in concluding that an arrest supported by probable cause could give rise to a retaliatory-prosecution claim, but it compounded that error by denying petitioners qualified immunity. "[T]o ensure that fear of liability will not 'unduly inhibit officials in the discharge of their duties,'" the qualified-immunity doctrine provides that "so long as they have not violated a 'clearly established' right," officials "are shielded from personal liability." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (citations omitted).

This Court has never held that an arrest supported by probable cause can violate the First Amendment. The court of appeals therefore relied solely on its own circuit precedent to conclude that the unconstitutionality of petitioners' conduct was "clearly established" and that qualified immunity was unavailable. See Pet. App. 34-35 & n.14. Its reasoning was critically flawed in two primary respects. First, the circuit precedent on which it relied predated *Hartman*, whereas the arrest in this case did not. See *id.* at 34 n.14; compare *Hartman*, 547 U.S. at 250 (decided April 2006), with Pet. App. 3 (respondent's arrest in June 2006). Even if this Court were to reject the contention that *Hartman*'s reasoning translates equally well (if not better) to retaliatory-arrest claims, see Part II.A, *supra*, that decision certainly could have led a reasonable officer to believe that an arrest supported by probable cause does not violate the First Amendment.

Second, multiple courts of appeals both before and after *Hartman* have either held or suggested that an

officer is entitled to qualified immunity from a First Amendment retaliatory-arrest claim so long as it would have been reasonable to believe that probable cause supported the arrest. See *McCabe*, 608 F.3d at 1079; *Redd* v. *City of Enterprise*, 140 F.3d 1378, 1383 (11th Cir. 1998); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); see also *Phillips* v. *Irvin*, 222 Fed. Appx. 928, 929 (11th Cir. 2007) (per curiam). Those courts' treatment of the absence of probable cause as an element of a First Amendment retaliatory-arrest violation demonstrates that a contrary conclusion would not have been clear to officers in the field like petitioners. See *Safford Unified Sch. Dist. No. 1* v. *Redding*, 129 S. Ct. 2633, 2644 (2009) (judicial differences of opinion can suggest that law is not clearly established).

The court of appeals' unilateral declaration of clarity was especially inappropriate in light of the protective function that petitioners were performing when they arrested respondent. The protective duties of the Secret Service are not confined to a particular geographic locale, but instead follow the protected individuals wherever they may be. It is unreasonable, undesirable, and unrealistic to expect agents to modify their performance of their duties based on the law of the local court of appeals, or to "abide by the most stringent standard adopted anywhere in the United States." *al-Kidd*, 131 S. Ct. at 2087 (Kennedy, J., concurring). As this Court has recognized, the qualified-immunity doctrine's "accommodation for reasonable error" is "nowhere more important than when the specter of Presidential assassination is raised." *Hunter*, 502 U.S. at 229.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2012

AMICUS CURIAE BRIEF

No. 11-262

IN THE

Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR., ET AL.,

Petitioners,

—v.—

STEVEN HOWARDS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF COLORADO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Colorado is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases involving the First Amendment, both as direct counsel and as *amicus curiae*.

The question in this case is whether law enforcement officials who arrest someone for exercising his First Amendment rights can ever be sued for money damages if the arrest is otherwise supported by probable cause. That question raises issues of substantial importance to the ACLU and its members because freedom from retaliation is an essential ingredient of freedom of speech.

STATEMENT OF THE CASE

In June 2006, then Vice President Cheney visited an outdoor mall in Beaver Creek, Colorado. *Howards v. McLaughlin*, 634 F.3d. 1131, 1135 (10th Cir. 2011). Plaintiff/respondent Steven Howards was visiting the mall and saw the Vice President "interacting with the gathering crowd, greeting patrons, shaking hands, and posing for photographs."

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[1] Letter of consent to the filing of this brief have been submitted to the Clerk of the Court pursuant to Rule 37.3. No counsel for a party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation of submission of this brief.

Id. at 1136. Mr. Howards was talking on his cell phone at the time, and said: "I'm going to ask him [the Vice President] how many kids he's killed today." *Id.* (alteration in original). Agent Doyle, one of the Secret Service agents accompanying the Vice President, overheard this conversation. He subsequently acknowledged that the comment "'disturbed him.'" *Id.*

Mr. Howards "waited for his turn" to speak to the Vice President. *Id.* When his turn came, he told the Vice President that "'his policies in Iraq [were] disgusting.'" *Id.* The Vice President responded, "'Thank you.'" *Id.* "As he departed, Mr. Howards touched the Vice President's right shoulder with his open hand." *Id.*[2] Although the record is unclear, it appears that Mr. Howards was carrying a bag during this encounter (as, presumably were others) and that he (and others) were approaching the Vice President without going through a magnetometer. *Id.* at 1137. The Secret Service agents who observed the encounter concluded that the touch was insufficient to provide probable cause to arrest Mr. Howards. *Id.* at 1136. Mr. Howards was allowed by all of the Secret Service agents to leave the vicinity though two of the agents recommended that the Secret Service "speak with [him]." *Id.*

Mr. Howards proceeded to join his family, who were attending a piano recital at the mall. When he arrived at the piano recital, his wife asked him to

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[2] For purposes of the qualified immunity motion, the Tenth Circuit accepted respondent's characterization that his touch of the Vice President was an "open-handed pat on the shoulder." 634 F.3d at 1136 n.2.

accompany their younger son home. On their way out of the mall, the younger son "wandered off." *Id.* at 1137. While looking for his son, Mr. Howards was approached by Agent Reichle, who "requested to speak" with him. *Id.* at 1137.[3] Mr. Howards initially declined, but when he attempted to leave and resume his search for his son, Agent Reichle blocked his way and prevented him from leaving. *Id.*

Agent Reichle then asked Mr. Howards if he had assaulted the Vice President. In response, Mr. Howards replied that he should not be questioned for sharing his opinions with the Vice President. *Id.* The agent became "'visibly angry'" when Mr. Howards expressed his views about the war in Iraq. *Id.* The agent asked Mr. Howards if he had touched the Vice President and Mr. Howards falsely denied doing so. *Id.*

Mr. Howards was then arrested by Agent Reichle for "assault" on the basis of "'premeditation, the conversation on the cell phone, the fact that Mr. Howards would not talk to [him], the fact that he's walking around with a bag in his hand in an unmagged [no metal detector] area, and the fact that [Doyle told him] that he had unsolicited contact'" with the Vice President. *Id.* at 1137-38 (alteration in original). The Secret Service took no further action. Instead, Mr. Howards was immediately turned over to the local police, detained for several hours and given a ticket for harassment. The prosecutor later dismissed all charges. *Id.* at 1138.

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[3] The Tenth Circuit decision does not indicate how far Mr. Howards was from the Vice President at this point.

After the charges were dismissed, Mr. Howards filed an action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that his First and Fourth Amendment rights had been violated by the actions of the Secret Service agents. Defendants moved for summary judgment, which was denied by the district court on the grounds that there were facts in dispute. Because the motions were in part based on qualified immunity, defendants appealed. *Id.* at 1138.

The Tenth Circuit affirmed in part and reversed in part. With regard to the Fourth Amendment claim, the court of appeals ruled that the agents had probable cause to arrest Mr. Howards for violation of 18 U.S.C. § 1001 (knowingly and willfully making a "materially false" statement), noting that Mr. Howards admitted that he had responded falsely when asked by Agent Reichle whether he had touched the Vice President. *Howards*, 634 F.3d. at 1141-42.[4]

However, the court allowed the First Amendment claim to proceed against Agents Reichle and Doyle, rejecting their argument that they could not be sued for retaliation because they had probable cause under § 1001 to arrest Mr. Howards for lying to a federal agent. Summarizing the evidence of retaliation in the record, the Tenth Circuit wrote:

> Mr. Howards has provided facts which suggest Agents Doyle and Reichle may have been substantially motivated by Mr. Howards' speech when he was arrested. Agent Doyle

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[4] The Fourth Amendment issue is not before the Court.

> overheard Mr. Howards say into his cell phone, "I'm going to ask him how many kids he's killed today." He admitted the comment "disturbed" him. He believed it was not "healthy" and was "[not] quite right" for someone to make such a comment to the Vice President. Similarly, Agent Reichle was told by Agent Doyle about Mr. Howards' cell phone conversation. Mr. Howards testified that when he told Agent Reichle "about the way [he] felt about the war in Iraq, Mr. Reichle became visibly angry...." Agent Reichle also admitted he considered this cell phone conversation when deciding to arrest Mr. Howards. Agents Doyle and Reichle do not dispute the district court's determination that "there is a question of fact on this element [of retaliation].... [because] there are conflicting accounts regarding which defendant knew what about plaintiff's cell phone conversation, when defendants knew it, and whether the conversation should be used to support probable cause."

Id. at 1145 (alterations in original) (citations to the record omitted).[5] One judge dissented on the basis of qualified immunity without directly reaching the question of whether probable cause to arrest automatically defeated a claim for First Amendment retaliation by the arresting officers.

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[5] The Tenth Circuit did affirm the dismissal of the retaliation claim against two other agents absent any evidence that they had acted with a retaliatory motive. *Id.* at 1149-50.

This Court granted certiorari to decide, in part, "[w]hether . . . the existence of probable cause to make an arrest" bars a First Amendment retaliatory arrest claim.

SUMMARY OF ARGUMENT

This Court should deny the writ of certiorari as improvidently granted. The Questions Presented assume there was probable cause to arrest Mr. Howards, but petitioners do not rely on the statute cited by the court of appeals and the court of appeals did not consider the statute now relied on by petitioners. Specifically, the Tenth Circuit found that there was probable cause to arrest Mr. Howards for a violation of 18 U.S.C. § 1001. By failing even to discuss § 1001 in their merits brief, petitioners have waived any argument under that statute in this Court. *See* Pet'rs' Br. at 51. Instead, petitioners rely exclusively on an argument that they had probable cause to arrest Mr. Howards for a violation of 18 U.S.C. § 3056(d). Because neither of the lower courts addressed the existence of probable cause under § 3056(d), and because this Court cannot reach the Questions Presented without first addressing the applicability of § 3056(d), the petition should be dismissed as improvidently granted.

On the merits, the issue before the Court is a narrow one. Probable cause is plainly relevant in a retaliation suit, and no party is claiming otherwise. But probable cause does not provide absolute immunity for retaliation suits under the First Amendment. This Court has repeatedly held that the First Amendment bars government officials from retaliating against the expression of constitutionally

protected views. Those rules do not change because the retaliation takes the form of an arrest. Indeed, there is no more coercive power that the government can exercise.

Under *Whren v. United States*, 517 U.S. 806 (1996), the Fourth Amendment is satisfied as long as there is probable cause to arrest, regardless of the motive of the arresting officer. Significantly, however, *Whren* also recognized that probable cause does not justify discrimination under the Equal Protection Clause. *Id.* at 813. The same principle applies to a First Amendment retaliation claim. As this Court has often explained, the prohibition against viewpoint discrimination has its roots in both the Equal Protection Clause and the First Amendment.

To be sure, the existence of probable cause establishes a constitutionally valid base for arrest. An arrest supported by probable cause is nonetheless unconstitutional under the First Amendment if it would not have occurred but for the exercise of constitutionally protected free speech rights, just as a public employee who might have been subject to dismissal for work related reasons can prevail by demonstrating that his dismissal was in fact based on First Amendment retaliation. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

The United States argues that probable cause should be dispositive when a First Amendment retaliation claim rests on an allegedly unconstitutional arrest because an improper motive is too easy to allege and would subject law enforcement officials to vexatious litigation. That argument suffers from two fatal flaws. First, as this

Court explained in *Crawford-El v. Britton*, 523 U.S. 574 (1998), the concerns raised by the government are properly addressed through qualified immunity and not by altering the elements of a retaliation claim or raising the pleading standards. Second, the government's argument applies equally to race discrimination claims, which also require proof of discriminatory intent. *Whren* correctly rejected that argument, which would shield law enforcement officials who utilize their authority to engage in discriminatory behavior.

Petitioners and their *amici* make several other arguments that should likewise be rejected. The United States urges this Court to hold that federal officials cannot be sued under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for a violation of First Amendment rights. U.S. Br. at 10-21. This Court has declined to adopt that position in the past and should not do so here. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009) ("[W]e assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens*."). Petitioners argue that a split in the circuits compels a finding of qualified immunity. Pet'rs' Br. at 41-43. This Court has said otherwise. *See Hope v. Pelzer*, 536 U.S. 730, 747-48 (2002) (rejecting the argument that disagreement by judges prevents a finding that the law is clearly established). While *amici* believe that neither of these arguments have merit, we do not address them separately in this brief.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

The threshold Question Presented in this case is whether "the existence of probable cause to make an arrest" bars a First Amendment retaliation suit. In order to reach that question, the Court first must determine if "probable cause to make an arrest" existed in this case. The Tenth Circuit found that probable cause did exist to arrest Mr. Howards for a violation of 18 U.S.C. § 1001. Although petitioners advanced that argument in the lower courts and in their Petition for Certiorari, they have now abandoned it and rely exclusively on 18 U.S.C. § 3056(d). Pet'rs' Br. at 45-51.[6] The only reference to § 1001 in petitioners' brief (other than description of the holding of the Court of Appeals) is found on page 51 and at that point petitioners urge the Court to decide the case "even without considering the agents' probable cause to arrest under 18 U.S.C. § 1001."

In *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994), the Court identified three factors that lead the Court to conclude that the issues "are not properly before the Court." First, the "argument was neither raised in nor addressed by the Court of Appeals." *See also Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *Devenpeck v. Alford*, 543 U.S. 146, 156 (2004) (declining to decide

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[6] The Solicitor General posits an additional basis, 18 U.S.C. § 1751(e) but the petitioners do not even mention that statute. U.S. Br. at 5.

probable cause issue not passed upon by the lower courts). That is true here as to petitioners' § 3056(d) argument. Second, the "contentions were not presented in the petition for writ of certiorari." *Posters 'N' Things*, 511 U.S. 527. That is true here as to petitioners' § 3056(d) argument. Third, "petitioners' brief on the merits fails to address the issue and therefore abandons it." *Id.; United States v. IBM*, 517 U.S. 843, 855 & n.3 (1996). That is true of petitioners' § 1001 argument. *See United States v. Jones*, 132 S. Ct. 945, 954 (2012) (deeming "forfeited" an argument that was neither raised nor considered below).

Petitioners did cite § 3056 in their Tenth Circuit brief but only for the proposition that § 3056 authorizes the Secret Service to arrest someone for lying in violation of § 1001.[7] Thus, the § 3056 claim below was wholly derivative of the § 1001 claim that petitioners have abandoned in this court. Pet'rs' Br. at 51. Petitioners argument in this Court, by contrast, is that probable cause existed to arrest Mr. Howards under § 3056.

In making a probable cause determination, courts are not bound by the legal basis asserted for the arrest if the facts known by the arresting officer support probable cause on some other legal ground. *Devenpeck*, 543 U.S. at 153. In this case, however, counsel have abandoned any legal basis other than § 3056(d), including the basis relied upon by the lower courts. It would be unwise for this Court to

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[7] Brief of Appellants Reichle and Doyle at 12, *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011) (No. 09-1202). *See also* Reply Brief of Appellants Reichle and Doyle, at 3.

resolve an issue of law not addressed by the lower courts (§ 3056(d)), or an issue of law abandoned by the petitioners (§ 1001).

It would be particularly inappropriate for this Court to decide the § 3056(d) issue in this case. Not only have neither of the lower courts addressed the applicability of the statute to the facts of this case, but there is apparently only one published lower court case interpreting the statute. *McCabe v. Parker*, 608 F.3d 1068 (8th Cir. 2010). The statute criminalizes anyone who "knowingly and willfully obstructs, resists, or interferes with a Federal law enforcement agent engaged in the performance of the protective functions [assigned the Secret Service]." 18 U.S.C. § 3056(d). This is not an assault statute or an "unsolicited contact" statute, but requires a showing that Mr. Howards obstructed the agents from protecting the Vice President. It would be an expansive reading of this statute to find obstruction based solely on Mr. Howards' insistence that he did not wish to continue the conversation with the agents[8] or on the basis that he was carrying a bag that the agents apparently never asked to inspect. It would be an even more expansive reading to conclude that Mr. Howards obstructed the Secret Service based on his statements of disagreement with the Vice President's policies. This Court ought not to rule on the application of § 3056 to these facts in the

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[8] *See* Pet'rs' Br. at 48, 51 (a Secret Service agent has grounds to arrest anyone who refuses to talk to the agent). Mr. Howards, of course, did talk to the agents.

first instance; it should instead dismiss the petition as improvidently granted.[9]

Mr. Howards' actions may well have provided a basis for the Secret Service to approach him and seek to speak with him. They might have provided a basis for the Secret Service to prevent him from approaching the Vice President a second time, or for observing him at close range to see if he suspiciously reached into his bag. But, it is quite another thing to conclude, without the benefit of serious briefing or lower court analysis, that they provided probable cause for an arrest under § 3056(d).

II. THE EXISTENCE OF PROBABLE CAUSE DOES NOT AND SHOULD NOT PRECLUDE EVEN THE POSSIBILITY OF A FIRST AMENDMENT RETALIATION CLAIM.

1. This Court has repeatedly and consistently recognized, over many decades, that the First Amendment prohibits the government from retaliating against the expression of constitutionally protected speech. That is true whether the allegation is that the government intentionally misplaced a prisoner's property to punish him for his outspoken views and legal advocacy, *Crawford-El*, 523 U.S. 574, or fired a public teacher because he had written a letter to the editor criticizing the school administration, *Pickering v. Board of Education of*

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[9] The Court in *Devenpeck* remanded for further consideration of the probable cause issue, 543 U.S. at 156, but it was not confronted with the abandonment issue raised by this record. In any event, this case will be returned to the district court for trial if the Court dismisses certiorari as improvidently granted.

Township High School District 205, 391 U.S. 563 (1968), or threatened to discharge non-policy making employees based on their political affiliation, *Branti v. Finkel*, 445 U.S. 507 (1980).[10]

As the Court explained in *Crawford-El*, "[t]he reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right." 523 U.S. 589 n.10. For that reason, the Court recognized, retaliation is "akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit." *Id.*, citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). In each instance, the government's punitive response to disfavored views or political associations violates the principle of viewpoint neutrality that lies at the core of the First Amendment. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

As long ago as 1959, the Court held that the government cannot engage in viewpoint discrimination. *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of N.Y.*, 360 U.S. 684 (1959). The *Kingsley* Court held that government could not "prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior." *Id.* at 688. Even viewpoints antithetical to democracy itself are protected under the Constitution. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (invalidating a statute that, among other things, criminalized the "mere advocacy" of

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[10] The same principle is reflected in the loyalty oath cases from a generation earlier. *See, e.g., Wieman v. Updegraff*, 344 U.S. 183 (1952).

violence "'as a means of accomplishing industrial or political reform.'"). "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Viewpoint discrimination strikes "at the very heart of constitutionally protected liberty." *Kingsley*, 360 U.S. at 688. "[P]unishment [on the basis of viewpoint] would be an unconstitutional abridgment of freedom of speech" and "cannot survive in a country which has the First Amendment." *Schacht v. United States*, 398 U.S. 58, 63 (1970). *See also Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." (citation and internal quotation marks omitted)); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (holding that, even in a nonpublic forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) ("The state may not ordain preferred viewpoints. . . . The Constitution forbids the state to declare one perspective right and silence opponents."), *aff'd*, 475 U.S. 1001 (1986).

In this case, the viewpoint expressed by Mr. Howard's criticism of Vice President Cheney involves core political speech. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-347 (1995); *R.A.V. v. City*

of St. Paul, 505 U.S. 377 (1992); *Texas v. Johnson*, 491 U.S. 397 (1989); *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring) (expression may not be forbidden "merely because public officials disapprove the speaker's views.").

2. In *Mt. Healthy*, 429 U.S. 274, the Court set forth the standards and procedures to be used in analyzing viewpoint discrimination that involves retaliation against individuals (or groups) for expressing their constitutionally protected views. Under those standards, a retaliation claim is difficult to prove.[11] A plaintiff must first establish that his First Amendment comments were a "substantial factor" in the decision challenged. The burden then shifts to the defendant to show that he would have taken the same action without regard to plaintiff's speech. Even if the First Amendment comments were a "substantial factor," the plaintiff cannot prevail if the defendant can show that the action would have occurred anyway. *Id.* at 287.

No party in this case disputes that an arresting officer can rely on the existence of probable cause to arrest in defending against a First Amendment retaliation claim. Indeed, that factor will be indisputably relevant. The question in this case is whether it will be conclusive, or whether the *Mt. Healthy* framework should apply.

In *Whren*, this Court held that an officer's subjective motive for an arrest is irrelevant to a

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[11] A public employee alleging discrimination has the additional burden of proving that he was punished for his speech as a citizen, not his speech as an employee. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Fourth Amendment claim because the only legally relevant question is whether the arrest was supported by probable cause. 517 U.S. at 806. At the same time, the Court was careful to note that the existence of probable cause does not foreclose the analytically distinct question of whether the government acted with discriminatory intent in violation of the Equal Protection Clause. 517 U.S. at 813. ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race.")

There is no reason to treat First Amendment retaliation claims any differently. This Court has always understood the doctrine of viewpoint neutrality as resting on equality principles that have their roots in both the Equal Protection Clause and the First Amendment. For example, in *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92 (1972), the Court summarized its holding by stating that, "under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." 408 U.S. at 96. If petitioners' arguments succeed in extinguishing the First Amendment claim, the analytical overlap would likely also extinguish the equal protection claim. This implicit overruling of both *Whren* and *Mosley* should be rejected.

An example illustrates the dangers of the petitioners' arguments. Assume two sets of demonstrators, placed equidistant from an intended audience just outside a properly constituted security zone. Assume further that the police announce that

if the people holding one viewpoint cross over into the security zone they will be arrested, but if the people who hold the opposite viewpoint do so, they will not be arrested. In both instances the police would have probable cause to arrest, but the intent and effect would be for the government to punish those with whom it disagrees.[12] Under petitioners' argument, the persons arrested would have no First Amendment claim and, implicitly, no equal protection claim.

At the very least, the allegations in this case share certain characteristics with that hypothetical for reasons that led the district court to deny petitioners' summary judgment motion. The agents admitted that at least one factor in their decision to arrest Mr. Howards was his viewpoint. Many of the rationales for arresting Mr. Howards, other than his comment on his cell phone, applied to others on that day who were not arrested. Others touched the Vice President. Pet'rs' Br. at 3. Others were presumably carrying bags or purses or backpacks. Immediately prior to arresting Mr. Howards, the arresting officer became "visibly angry" upon hearing Mr. Howards' views on the Iraq war. And, of course, there were alternatives available to the agents other than arrest such as preventing Mr. Howards from approaching the Vice President.

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[12] This hypothetical is not implausible. *Pahls v. Bd. of Cnty. Comm'rs*, No. Civ. 08-53 LH/ACT (D.N.M. Feb. 22, 2011), *available at* http://www.nmcourt.fed.us/Drs-Web/view-file?unique-identifier=0003597662-0000000000 (denying summary judgment in case alleging Secret Service and local police treated pro-Bush demonstrators more favorably than anti-Bush demonstrators), *appeal docketed*, No. 11-2055 (10th Cir. Mar. 16, 2011), No. 11-2059 (10th Cir. Mar. 24, 2011).

3. The United States suggests that equal protection claims are somehow based on more objective criteria than First Amendment retaliation claims. U.S. Br. at 17. The United States would thus apparently view the statement in *Mosley* that cases such as this raise overlapping First and Fourteenth Amendment claims as error. But even without *Mosley*, the argument by the United States is without merit. As this Court discussed in *Crawford-El*, the need to establish a discriminatory motive is a common element of both First Amendment retaliation claims and equal protection claims. 523 U.S. at 585. Thus, the distinctions proffered by the United States cannot be sustained. A decision to eliminate a First Amendment claim would inevitably lead to elimination of equal protection claims as well. The Court should not reach that decision.

It is also unnecessary to go as far as the government suggests. *Crawford-El* makes clear that any concerns about subjecting law enforcement officials to unwarranted liability in the face of legal uncertainty can be fully addressed through the qualified immunity inquiry and not by altering the elements of a First Amendment retaliation claim.

Notwithstanding this long history of protecting against retaliation on the basis of viewpoint, petitioners and their *amici* argue that this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), is fatal to the First Amendment retaliation claim in this case. *Hartman* cannot be read so broadly. *Hartman* held that federal investigators could not be sued under *Bivens* for "inducing prosecution in retaliation for speech," *id.* at 252, without alleging

and proving that the underlying arrest lacked probable cause. The Court relied, in large part, on the fact that any improper motive of the officer could not be imputed to the prosecutor. *Id.* at 259, 262. As the Tenth Circuit correctly understood, the *Hartman* Court was not extinguishing long-established substantive law but applying equally fundamental law that no party can obtain recovery from a person who did not cause the harm. Based on this rationale, the Tenth Circuit correctly found that *Hartman* did not preclude a suit for false arrest under the First Amendment based on the officer's desire to punish viewpoints with which the officer disagreed.

4. Petitioners and their *amici* (including the United States) raise various additional factors in urging this Court to extend *Hartman* beyond its causation rationale. Like the claim that subjective motivation is easy to allege and hard to disprove, virtually all of those factors were considered and rejected in *Crawford-El*. Thus, Petitioners and the United States emphasize that Secret Service agents often have to make split-second decisions affecting the lives and safety of others. That is, of course, true. It is also true for prison guards and police. But, as the facts alleged in *Crawford-El* and this case demonstrate, law enforcement officials, including Secret Service agents, can also make decisions slowly and deliberately and may decide on occasion to retaliate against someone because they disagree with that person's views. The fear that offenders will speak up at the time of arrest to manufacture an unworthy First Amendment claim would be equally applicable to inmates and to anyone arrested on the street. In each of these contexts, the need for split-second decisionmaking may be powerful evidence

against a claim of retaliatory motive. It is not a reason to create a new set of rules that immunize even retaliatory action and leave its victims without any meaningful remedy.

Petitioners and their *amici* also assert that there are occasions when it is appropriate for law enforcement officials to consider protected speech when deciding whether to exercise their discretion to arrest. For example, the United States suggests that a trespasser who "belligerently states" that "the government has no right to own property" is less likely to cease trespassing when confronted by the police than someone who is just taking a shortcut home. U.S. Br. at 26.[13] That hypothetical cannot support the weight that the government wants to put on it. Assuming the existence of probable cause, the fact that a suspect's speech may sometimes support the decision to arrest does not mean that the decision to arrest based on a suspect's speech is always appropriate and never subject to review in a subsequent damages action. A slight twist in the government's hypothesized facts makes that distinction evident. Suppose that a trespasser accuses the government of exercising its power of eminent domain to serve the rich rather than the poor, and he does so quietly rather than belligerently as he is leaving the property. Then suppose that, under these circumstances, the police choose to exercise their discretion to arrest the trespasser for his discontinued trespass because they are offended by his political views. And suppose, further, that all

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[13] See also *Amici Curiae* Br. for Int'l City/Cnty. Mgmt. Ass'n, *et. al.*, at 12 (t-shirt quoting Thomas Jefferson can properly form the decisive basis for an arrest based on probable cause).

criminal charges were later dropped. Under the government's theory, even an act of undisguised political retaliation could not give rise to a damages action if there was probable cause to arrest. That is nothing more than an assertion that the First Amendment permits a police officer to arrest someone (if they have cause) solely because the officer disagrees with the political views of the person involved. It is difficult to reconcile such an assertion with the First Amendment.

In rejecting the argument that subjective motives should be irrelevant in First Amendment retaliation (and other) cases, this Court's decision in *Crawford-El* identified a series of "countervailing concerns that must be considered." 523 U.S. at 591. Each of those concerns is equally applicable here and supports the decision below. First, "'an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.'" *Id.* at 591 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). In this case, neither petitioners nor the United States are suggesting there is another avenue for vindication of constitutional rights. Second, the availability of qualified immunity "eliminates all motive-based claims in which the official's conduct did not violate clearly established law," 523 U.S. at 592, while allowing recovery when clearly established law is disregarded. Third, a defendant who violates clearly established law can still escape liability by showing that he "would have reached the same decision in the absence of the protected conduct." *Id.* at 593. Fourth, district court judges have a variety of procedural mechanisms available to them to weed out frivolous or meritless claims. *Id.* at 597-601. Those include "demanding more specific

allegations of intent," *id.* at 598, a requirement that has even more force since this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Weighing all these considerations together, the Court in *Crawford-El* had little difficulty concluding that,

> "the improper intent element of various causes of action should not ordinarily preclude summary disposition of insubstantial claims. . . . [and there is no justification for] a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved."

Id. at 593.

In short, the justifications offered for creating an irrebuttable presumption that retaliation was never the motivating factor when a police officer arrests an individual have been previously rejected by this Court and should be rejected again.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be dismissed as improvidently granted. Alternatively, the judgment below should be affirmed.

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AMICUS CURIAE BRIEF

No. 11-262

In the Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR.,
DAN DOYLE,

Petitioners,

v.

STEVEN HOWARDS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF FBI AGENTS ASSOCIATION AND FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The FBI Agents Association (FBIAA), formed in 1981, is a non-profit professional association representing over 12,000 active and retired FBI Special Agents, including approximately three-quarters of current FBI Special Agents. The Federal Law Enforcement Officers Association (FLEOA), formed in 1977, is a nonpartisan and non-profit professional association exclusively representing federal law enforcement officers. FLEOA currently represents over 25,000 federal law enforcement officers from 65 federal agencies.

FBIAA and FLEOA were both formed to represent the interests of their members in legislative, regulatory, and judicial fora. FBIAA and FLEOA serve as advocates for their members on matters ranging from pay and benefits to the policies necessary for Agents and other federal law enforcement officers to be most effective in their efforts to combat crime, terrorism, and other threats to the public.

FBIAA and FLEOA members are directly involved in the arrest and detention of persons and the investigation of crimes that threaten the security and safety of the United States and its citizens. FBIAA and FLEOA members are required to use their skills and education to make quick decisions in complex situations. Requiring them to defend against allegations that an arrest supported by

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[1] Pursuant to Rule 37.6, Amici certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than Amici or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

probable cause had an improper retaliatory motive would undermine their effectiveness, introducing unnecessary second-guessing and risk of personal liability into the law enforcement process. Accordingly, FBIAA and FLEOA submit that, consistent with the holdings of the Second, Sixth, Eighth, and Eleventh Circuits, their members should be immune from retaliatory arrest claims when probable cause exists for the underlying arrest.

SUMMARY OF THE ARGUMENT

The tens of thousands of law enforcement officers represented by Amici dedicate their lives to protecting public safety. In doing so, they are called upon to use their skills and experience to make difficult and time-sensitive decisions. These officers need to be able to perform their duty of protecting the public without the constant fear of being sued. That is why this Court has developed objective, bright-line rules to govern law enforcement conduct. The probable cause standard is the chief example. Time and again the Court has applied this workable rule in the law enforcement context. And it has resisted the temptation to complicate this clear standard with subjective inquiries or endless exceptions.

The Court once again took this prudent path in *Hartman v. Moore*, 547 U.S. 250 (2006), holding that retaliatory prosecution claims cannot proceed when the prosecution is supported by probable cause. The subjective intentions of the officer urging prosecution or the special circumstances of the case are of no moment. If there was objective probable cause, that is the end of the inquiry.

The same legal and policy considerations that drove the *Hartman* analysis apply with equal force

in the retaliatory arrest context. And the same rule should apply as well: if probable cause supported the arrest, a retaliatory arrest claim cannot proceed. By adopting such a rule, this Court can stay true to the letter and spirit of *Hartman* and honor its long tradition of objective, bright-line rules for law enforcement conduct.

ARGUMENT

I. The *Hartman* rationales apply with equal force to retaliatory arrest claims.

Hartman v. Moore dictates the outcome of this case. In *Hartman*, this Court held that a retaliatory prosecution plaintiff must plead and prove the absence of probable cause. 547 U.S. at 265-66. The Court focused its opinion on the causation element of a retaliatory prosecution claim, considering the unique causal aspects of such a claim and observing that the probable cause inquiry "will have high probative force" on the causation issue. *Id.* at 260-65. This Court also injected practicality into the analysis by noting that requiring a showing of no probable cause would have "little or no added cost." *Id.* at 265. Because the absence of probable cause was a highly probative factor that could be made an element of a retaliatory prosecution claim virtually cost-free, the Court added this element to the claim. *Id.* at 265-66.

These same rationales for the *Hartman* decision support adding a no-probable-cause element to a retaliatory arrest claim. From the unique causal considerations to the cost-benefit analysis, there is no meaningful distinction between retaliatory arrest claims and the retaliatory prosecution claims addressed in *Hartman*.

A. *Hartman*'s twin pillars support extending its rule to retaliatory arrest claims.

Hartman relied on two unique causal aspects of retaliatory prosecution claims in reaching its holding. First, the presence or absence of probable cause offers "a distinct body of highly valuable circumstantial evidence" on whether retaliatory animus was the cause of the injury. *Hartman*, 547 U.S. at 260-61. Second, retaliatory prosecution claims involve complex causal relationships because the defendant is not the prosecutor, but rather an official who, because of retaliatory animus, induced the prosecutor to proceed with the case. *Id.* at 261-64. While the *Hartman* Court discussed these causal issues in the context of retaliatory prosecution claims, both of them are present in retaliatory arrest claims as well.

1. First, probable clause provides a legitimate basis for both prosecution and arrest. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (arrest); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (prosecution). Thus, whether arrest or prosecution is the harm at issue, the probable cause inquiry often disposes of the question whether retaliatory animus or legitimate considerations caused the harm. "[E]stablishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive," *Hartman*, 547 U.S. at 261; the same can be said for an arrest. Likewise, "evidence showing whether there was or was not probable cause" is "apt to prove or disprove retaliatory causation" (*id.*) in both the arrest and prosecution contexts.

Given this close relationship between the causation issue and probable cause in both retaliatory

prosecution and retaliatory arrest claims, adding a no-probable-cause element "will usually be cost free by any incremental reckoning." *Id.* at 265. Indeed, "[t]he issue is so likely to be raised by some party at some point that treating it as important enough to be an element will be a way to address the issue of causation without adding to time or expense." *Id.* Thus, the cost-benefit balance favors the inclusion of a no-probable-cause element in a retaliatory arrest claim.

2. Furthermore, as with retaliatory prosecution claims, the causation analysis for retaliatory arrest claims is "usually more complex than it is in other retaliation cases." *Id.* at 262. One complicating factor in the retaliatory arrest context is that a suspect's speech often provides probable cause for making an arrest. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (finding a suspect's statements relevant to whether there was probable cause to arrest him for threatening the President).

Even when the expressive activity falls short of producing probable cause, such speech may legitimately inform an officer's discretionary decision whether to arrest an individual when he has probable cause to do so. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (recognizing the "deep-rooted nature of law-enforcement discretion"). For example, when an officer pulls someone over for speeding, he is "authorized (not required, but authorized) to make a custodial arrest" because there is "probable cause to believe that [the suspect] committed a crime in his presence." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). A suspect's speech in this situation informs the officer's discretion. If the suspect offers a sincere apology for the infraction, it stands to reason that that individual will

comply with traffic laws in at least the immediate future. If, on the other hand, the suspect aggressively announces his belief that speed limits are an unconstitutional restraint on liberty, that is one factor to consider in evaluating whether he will be a continuing threat to public safety.

Thus, the court's task in the retaliatory arrest context is to separate legitimate speech-based arrests from illegitimate ones motivated by retaliatory animus. This task may be impossible when legitimate safety considerations and alleged retaliatory animus arise from the same speech, as is so often the case.

Additionally, the major causation complexity that *Hartman* identified in retaliatory prosecution cases can also arise in retaliatory arrest cases. While some retaliatory arrest claims concern the retaliatory animus of the person making the arrest, others involve "the retaliatory animus of one person and the action of another." *Hartman*, 547 U.S. at 262. For an example, one need look no further than the claim against Agent Doyle in this case. Agent Reichle is the one who arrested respondent. JA 46. Yet respondent also brought a retaliatory arrest claim against Agent Doyle, presumably based on the theory that Agent Doyle, out of retaliatory animus, influenced Agent Reichle to make the arrest. *See* JA 12-13; 63-64. Thus, the same causal complexity that this Court identified in retaliatory prosecution claims can also apply to retaliatory arrest claims. As in *Hartman*, this complexity counsels in favor of making the absence of probable cause an element of a retaliatory arrest claim.

B. An additional consideration in *Hartman*, the presumption of regularity, also is present in the retaliatory arrest context.

Another consideration the *Hartman* Court found important was that prosecutors enjoy a presumption of regularity, meaning that they are presumed to have legitimate grounds for their actions. *Hartman*, 547 U.S. at 263-65. A plaintiff must overcome this considerable presumption to prove that the nonprosecuting official's retaliatory animus "infected the prosecutor's decision to bring the charge." *Id.* This burden further complicates the causation analysis.

A close examination reveals that a similar presumption applies in the arrest context. There is no general presumption that law enforcement conduct is legitimate. But there is such a presumption when probable cause supports an officer's actions. This Court repeatedly has held that when objective probable cause supports a law enforcement officer's actions, the inquiry ends there: "We ask whether 'the circumstances, viewed objectively, justify [the challenged] action.' If so, that action was reasonable 'whatever the subjective intent' motivating the relevant officials." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (internal citations omitted); *see also Devenpeck*, 543 U.S. at 153 ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."); *Whren v. United States*, 517 U.S. 806, 813 (1996) (reviewing cases). This presumption extends

even to areas where Fourth Amendment considerations run up against First Amendment concerns. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) ("Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.").

This presumption of regularity when there is probable cause presents the same issue in the retaliatory arrest context that the similar presumption does with retaliatory prosecution claims. The plaintiff must overcome this strong preference for ending law enforcement challenges at the probable cause stage if he is to prevail on a retaliatory arrest claim.

* * *

The very same causation considerations that form the basis of *Hartman* are also present in the retaliatory arrest context. The causation analysis can be just as complex in retaliatory arrest cases as in retaliatory prosecution cases. And the complexities arise for many of the same reasons in both situations. Additionally, the absence of probable cause is highly relevant to the causation question in both claims. Therefore, based on the reasoning of *Hartman*, this Court should adopt a no-probable-cause element for retaliatory arrest claims.

II. Applying the *Hartman* rule to retaliatory arrest claims is in keeping with this Court's tradition of embracing objective rules for law enforcement conduct.

A. This Court has repeatedly applied bright-line rules to law enforcement conduct.

This Court has a long tradition of applying objective, bright-line rules to law enforcement conduct. Case after case has refused to take the inquiry beyond objective analysis, particularly when there is probable cause, and has resisted the temptation to carve out exceptions to cover every conceivable situation. *See Ashcroft*, 131 S. Ct. at 2080; *Devenpeck*, 543 U.S. at 153; *Whren*, 517 U.S. at 813; *Zurcher*, 436 U.S. at 565. In doing so, the Court has shown admirable discipline in "respect[ing] the values of clarity and simplicity." *Atwater*, 532 U.S. at 347.

1. Objective, workable rules are of special import in the law enforcement context because they must "be applied on the spur (and in the heat) of the moment." *Id.* As this Court recently recognized in discussing the need for qualified immunity for warrantless entries, law enforcement officers must make split-second judgments in difficult and uncertain situations, and "judges should be cautious about second-guessing a police officer's assessment . . . of the danger presented by a particular situation." *Ryburn v. Huff*, No. 11-208, slip op. at 8 (U.S. Jan. 23, 2012) (per curiam).

The need for swift application raises more concerns with retaliatory arrest claims than it does with retaliatory prosecution claims. Whereas an officer has days, weeks, or even months to quietly contem-

plate whether to recommend an individual for prosecution, decisions to arrest must be made in mere minutes or seconds in the midst of danger and uncertainty. Intricate, specialized rules that second-guess an officer's actions on the basis of subjective factors have no place in such situations. They would cause dangerous hesitation and lead to deadly results.

Faced with the unique challenges that come with crafting rules for these tense situations, this Court has announced as its goal "to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Id.* It also has been mindful that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Horton v. California*, 496 U.S. 128, 138 (1990). The Court has developed and fine-tuned the probable cause standard with these interests in mind.

Probable cause is an objective rule that focuses on whether actions were reasonable based on the information known at the time. In the arrest context, for instance, the dispositive question is "whether at [the] moment [of the arrest] the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Such a rule gives guidance and comfort to officers in the field, for law enforcement officers do not begrudge being held to a transparent, objective standard of conduct. What causes them concern, instead, is the

specter of a judge or jury searching their psyche, in hindsight, for evidence of ill motives. Because this speculative inquiry offers no practical guidance on how to conduct oneself in the field, law enforcement officers must take all manner of precautions if they hope to avoid a lawsuit. Worse, they must do so even when their actions are objectively reasonable. The probable cause rule avoids all these problems because as long as the objective facts support an officer's actions, no further scrutiny is necessary.

2. As importantly, rules for law enforcement conduct must apply across the board rather than being riddled with exceptions. Exceptions impair the benefits of clear, bright-line rules. *See Devenpeck*, 543 U.S. at 154 (declining to adopt a Fourth Amendment rule that resulted in "arbitrary variable protection"). For law enforcement officers in the field, exceptions add additional steps to an already rushed inquiry, injecting hesitation and confusion into a dangerous situation. Exceptions also burden the judicial system by complicating and multiplying the factual and legal issues in dispute. Judicial reconstruction of these heated law enforcement encounters is already difficult enough without these added burdens. The frailties of human memory manifest themselves when trying to recall the precise details of a dynamic, tense situation that occurred far i the past. Adding more complexity to this already challenging analysis may make reaching the correct outcome a nearly impossible task.

Additionally, the proposed exception to the probable cause standard in this case—that First Amendment retaliatory arrest claims can proceed in the face of probable cause—is much broader than it may appear. *Cf. Davis v. Scherer*, 468 U.S. 183, 195

(1984) ("Appellee proposes that his new rule for qualified immunity be limited by requiring that plaintiffs allege clear violation of a statute or regulation that advanced important interests or was designed to protect constitutional rights. Yet, once the door is opened to such inquiries, it is difficult to limit their scope in any principled manner."). Political speech may be the most salient beneficiary of First Amendment protection, but it is not the only one. In fact, the First Amendment covers a vast range of expressive activity. Even belligerent expressive conduct towards law enforcement officers often finds sanctuary in the First Amendment. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."); *see, e.g.*, *Greene v. Barber*, 310 F.3d 889, 895-96 (6th Cir. 2002) (First Amendment protects swearing at an officer); *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 415-16 (2d Cir. 1999) (First Amendment protects threatening an officer with "one day you're gonna get yours").

It is of course not uncommon for the subject of an arrest to hurl insults at the arresting officer. If the *Hartman* rule does not extend to retaliatory arrest claims, then the officers in every one of these instances will face the burdensome prospect of defending retaliatory arrest claims even if their actions were objectively reasonable. The exception will have swallowed the rule.

3. The policy benefits of objective, bright-line rules attain special significance in the qualified immunity setting. "[B]ecause '[t]he entitlement is an immunity from suit rather than a mere defense to liability,' [this Court] repeatedly [has] stressed the

importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 502 U.S. at 227 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). An objective, bright-line standard like probable cause is well-suited for this purpose because it lends itself to an earlier disposition. By contrast, a rule that permits exceptions or demands investigation into an officer's subjective motivations falls short in this regard, for it creates fact issues that often cannot be resolved until trial.

A second aspect of qualified immunity that merits attention is the doctrine's recognition of the chaotic, confusing environment in which law enforcement conduct often takes place. The Special Agents and other federal law enforcement officers represented by Amici are trained and skilled at evaluating risks quickly and efficiently in order to take actions to prevent and investigate serious threats to public safety and national security. Subjecting these decision-making processes to an academic deconstruction through litigation will fail to capture the real exigencies of the situation faced by the officers, and could discourage law enforcement officers from taking the decisive actions that are often essential to protect the public. Officers "should not err always on the side of caution" and default to inaction in these tense situations, for that would create a paralysis that does more harm than good. *Davis*, 468 U.S. at 196; *see also id.* ("[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 245 (1974) (internal quotation marks omitted)). For law enforcement officers to be able to protect and serve without constantly looking

over their shoulder, second-guessing in the face of objective reasonableness must be avoided. *Atwater*, 532 U.S. at 347. This Court has done just that in the qualified immunity context, providing law enforcement officers with necessary breathing room by giving them the benefit of the doubt when they act with probable cause.

B. *Hartman* follows in this tradition, and so should this case.

Hartman is an apt example of this Court's commitment to objective, bright-line rules in the law enforcement context. The Court showed fidelity to objective rules for law enforcement conduct by ending the retaliatory prosecution inquiry when probable cause exists, thereby excluding subjective motivations from the analysis. *Hartman*, 547 U.S. at 265-66. Additionally, the *Hartman* Court favored a bright-line rule, as opposed to one riddled with exceptions. *Id.* at 264 & n.10. The Court cast aside calls to structure a complex rule that took into account various unlikely situations. *Id.* Such an endeavor "would seem a little like proposing that retirement plans include the possibility of winning the lottery." *Id.* at 264 n.10. And the Court knew the harm that would follow "if any exemption to a no-probable-cause requirement is allowed." *Id.* That is why the *Hartman* Court adopted a clear, simple rule with no exceptions, one that covers the vast majority of situations without becoming bogged down in endless permutations.

The Court should continue its commitment to objective, bright-line rules in this case. The same policy considerations that informed *Hartman* speak with force here as well. The perils of subjective review of

law enforcement actions loom large here as they did in *Hartman*. Similarly, the prospect of a bright-line rule is just as attractive here as it was in *Hartman*. And finally, the special concerns of the qualified immunity doctrine tip the scales in favor of an objective, bright-line rule in this case just as they did in *Hartman*. Given these policy parallels between *Hartman* and this case, both should reach the same result.

* * *

While no standard is perfect, the probable cause rule has provided clear guidance to law enforcement. The Court has repeatedly resisted the temptation to water down this objective rule with exceptions customized for every conceivable set of facts. This tradition continued with *Hartman*, and it would be imprudent to abandon this time-tested rule now.

III. Limiting the *Hartman* rule to retaliatory prosecution claims would have adverse consequences.

Yet another reason the Court should extend the *Hartman* rule to retaliatory arrest claims is that failing to do so would have detrimental effects. Because the First Amendment protects insulting and belligerent speech, as discussed above, allowing retaliatory arrest claims to proceed in the face of probable cause favors individuals who engage in antagonistic behavior towards law enforcement over those who cooperate. Such a rule creates perverse incentives for individuals dealing with law enforcement. It encourages combative behavior and discourages cooperation. Not only would these incentives make the job of law enforcement officers that much harder, they also defy common sense. If anything, amicable

conduct is what should be rewarded, not belligerence.

Rewarding insulting speech also harms the First Amendment itself by cheapening the sacred right of free speech. Freedom of expression becomes nothing more than a lottery ticket, a chance to cash in when one is arrested. And in time the public may come to view the First Amendment not as a venerable guarantee of freedom, but as a bothersome technicality, a loophole exploited by those who refuse to accept the consequences of their actions. Though the risk of such a reversal of public sentiment may seem remote, one cannot deny that the danger exists. And if it did come to pass, the damage done would be all too real.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

No. 11-262

IN THE

Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR., DAN DOYLE,
Petitioners,

v.

STEVEN HOWARDS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND UNITED STATES CONFERENCE OF MAYORS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Whether a person who is arrested upon probable cause is barred from bringing a First Amendment retaliatory arrest claim against the arresting officer?

Whether the Secret Service agents in this case were properly denied qualified immunity?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE* [1]

Amici and their members represent all levels and aspects of state and local government including law enforcement agencies such as state police, county sheriff departments, and municipal police forces. *Amici* and their members have an interest in ensuring that the police officers they employ to protect the public safety are able to arrest citizens based upon probable cause without fearing the officers will be sued for money damages for First Amendment violations. *Amici* and their members likewise have an interest in ensuring that police officers are granted qualified immunity when the law isn't clearly established as their members may pay the money damages.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 of appointed chief executives and assistants serving cities, counties, towns, and regional entities. Its mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici* and their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.

international clearinghouse for legal information and cooperation on municipal legal matters.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

Founded in 1908, the National Governors Association (NGA) is the collective voice of the nation's governors. Its members are the governors of the 50 states, three territories, and two commonwealths.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with populations of more than 30,000. There are over 1,200 such cities in the country today. Each of these cities is represented in the Conference by its chief elected official, the mayor.

STATEMENT

This case arises from the arrest of Steven Howards following an encounter with Vice President Dick Cheney at an outdoor shopping mall. Pet. App. at 5. Petitioners Gus Reichle and Dan Doyle were part of the Secret Service team assigned to protect the Vice President. *Id.* The mall had not been screened for weapons. *Id.*

Prior to the encounter, Agent Doyle overhead Mr. Howards speaking into his cell phone, "I'm going to ask him how many kids he's killed today." *Id.* Mr. Howards approached the Vice-President holding an opaque bag, told the Vice-President that his policies in Iraq were disgusting, and then made unsolicited physical contact with the Vice President. *Id.*

The foregoing information was relayed to Agent Reichle who then approached Mr. Howards, presented his badge, and asked to speak with Mr. Howards. *Id.* at 5-6. Mr. Howards was initially uncooperative, and then did not answer truthfully when asked whether he had made contact with the Vice President. *Id.* at 6. Mr. Howards was arrested for harassment, held for a few hours, then released. *Id.* State charges were dismissed. No federal charges were filed. *Id.*

Mr. Howards brought a *Bivens* action against the Petitioners and others alleging that he was arrested without probable cause in violation of the Fourth Amendment and in retaliation for the exercise of his First Amendment rights. *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011). Petitioners moved for summary judgment on the basis of qualified immunity, but the motion was denied. 634 F.3d at 1138. Petitioners took an interlocutory appeal.

The Court of Appeals for the Tenth Circuit reversed in part, holding that taking the facts in the light most favorable to Mr. Howards, Petitioners had probable cause to arrest him for lying to them. *Id.* at 1142. Therefore, Petitioners were entitled to qualified immunity on Mr. Howards' Fourth Amendment claim. *Id.*

Nonetheless, the court of appeals held that prior circuit precedent permitted a plaintiff to pursue a

First Amendment retaliatory arrest claim notwithstanding the existence of probable cause to make the arrest. *Id.* at 1148-49. The court then held that this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), which held that a plaintiff bringing a retaliatory prosecution claim must plead and prove a lack of probable cause, did not affect or even unsettle prior circuit precedent. Therefore, the court affirmed the trial court's denial of the Petitioners' motion for summary judgment on the First Amendment claim. 634 F.3d at 1148.

SUMMARY OF ARGUMENT

In this case this Court must balance the rights of citizens to speak with the rights of state and local police officers to make arrests where probable cause is present. This balance should weigh in favor of police officers who may otherwise be the victim of lawsuits for money damages, which may arise often and are difficult to defend. Retaliatory arrest claims are easy for a citizen to allege and difficult for a police officer to disprove. If First Amendment retaliatory arrest claims are allowed to go forward even where probable cause is present, state and local police officers may be disinclined to make arrests, which will be detrimental to public safety. And the rationale for the no-probable-cause requirement for First Amendment retaliatory prosecution claims adopted by this Court in *Hartman v. Moore*, 547 U.S. 250 (2006), applies equally to retaliatory arrest claims.

The Secret Service agents in this case should have been granted qualified immunity. The impact of *Hartman* on previous Tenth Circuit retaliatory arrest case law was unknown until the Tenth Circuit ruled in this case. Because not even experienced lawyers

could predict how the Tenth Circuit would apply *Hartman* to retaliatory arrests claims, qualified immunity should be granted to police officers asked, practically speaking, to do just that.

ARGUMENT

I. PROBABLE CAUSE SHOULD BAR FIRST AMENDMENT RETALIATORY ARREST CLAIMS.

A. State and Local Law Enforcement Will Be Significantly Impeded If First Amendment Retaliatory Arrest Claims Are Permitted When Probable Cause Supported The Arrest.

The guarantees of the Free Speech Clause prohibit government officials from taking retaliatory action against an individual because of an exercise of his or her free speech rights. *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). Persons who believe that government officials retaliated against them for an exercise of their free speech rights may bring an action for money damages and attorney fees pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988. Consistent with this framework, citizens who have been arrested *without probable cause* in retaliation for constitutionally protected expression state a valid First Amendment claim. *See generally Kennedy v. City of Villa Heights*, 635 F.3d 210 (6th Cir. 2011) (denying summary judgment to police officer where arrest of citizen lacked probable cause); *Jones. v. Parmley*, 465 F.3d 46 (2d Cir. 2006) (same). This case, however, arises out of a narrow species of First Amendment retaliation suits in which the plaintiff was lawfully arrested *based upon an objective showing of probable cause.*

While the facts in this case involve federal officers protecting the Vice President of the United States, the vast majority of cases addressing this issue involve local law enforcement officials. *See, e.g.*, *Kennedy v. City of Villa Hills*, 635 F.3d 210 (action against municipal police officer); *Mesa v. Prejean*, 543 F.3d 264 (5th Cir. 2008) (same); *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008) (same); *King v. Ambs*, 519 F.3d 607 (6th Cir. 2008) (action against township police officer); *Williams v. City of Carl Junction*, 480 F.3d 871, 874-75 (8th Cir. 2007) (action against mayor and police chief); *Leonard v. Robinson*, 477 F.3d 46 (6th Cir. 2007) (action against municipal police officer); *Skoog v. County of Clackamas*, 469 F.2d 1221 (9th Cir. 2006) (action against county sheriff); *Jones v. Parmley*, 465 F.3d 46 (action against sheriff's deputies); *Barnes v. Wright*, 449 F.3d 709, 711-13 (6th Cir. 2006) (action against conservation officer); *Keenan v. Tejeda*, 290 F.3d 252, 256-57 (5th Cir. 2002) (action against county constables); *Curley v. Village of Suffern*, 268 F.3d 65, 68, 73 (2d Cir. 2001) (action against municipal police officers); *Smithson v. Aldrich*, 235 F.3d 1058, 1060 (8th Cir. 2000) (same); *Reed v. City of Enterprise*, 140 F.3d 1378 (11th Cir. 1998) (same); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 12-13 (2d Cir. 1995) (action against county sheriff); *Mozzochi v. Borden*, 959 F.2d 1174 (2d Cir. 1992) (action against town manager and police officer).

State and local police officers protect the public peace in a variety of ways, ranging from working in conjunction with federal authorities on security arrangements for the President and Vice President to removing protesters from public spaces when they have violated the law. As discussed in more detail below, in almost every interaction a police officer has,

he or she encounters speech protected by the First Amendment. As a result, the Court's disposition of this case will significantly affect the policing practices of state and local law enforcement officers.

This Court acknowledged in *Crawford-El* that a government official's motives are "easy to allege and hard to disprove." 523 U.S. at 585. So it is easy for an arrestee who called an officer a "fat slob" to claim this was the "real" reason the officer arrested him. And it is hard for the officer to prove she "really" arrested him for loitering in violation of a local ordinance. In this case this Court must strike a balance between the rights of citizens to express themselves and the rights of police officers to make lawful arrests. This Court should strike this balance in favor of state and local police officers who will otherwise be subject to lawsuits for money damages that are difficult to disprove.

1. Almost Every Persons Arrested Might Be Able To Subject Officers To A First Amendment Retaliation Claim.

In *Hartman v. Moore*, 547 U.S. 250, 258-59 (2006), this Court was skeptical that the volume of litigation involving retaliatory prosecutions in violation of the First Amendment was a reason to require the absence of probable cause. But arrests are very different from prosecutions when it comes to free speech. Most people facing prosecution have not spoken publically about a matter related to their prosecution like the Respondent in *Hartman*. By contrast, almost every arrest involves some verbal exchange between the officer and the arrestee.

Law enforcement officers patrol the streets, sidewalks, and parks—spaces that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Education Association v. Perry Local Educators' Association*, 469 U.S. 37, 45 (1983). Virtually all speech that an officer encounters is protected by the First Amendment even if it is hostile,[2] profane,[3] or intended to cause discomfort.[4] And much of that abrasive speech is directed toward law enforcement officers. *See City of Houston v. Hill*, 482 U.S. 451, 462 (1987) (police must exhibit a higher degree of restraint responding to "fighting words"). So, every arrest could involve a possible First Amendment claim unless the arrestee is totally silent. And arrestees don't even have to speak to be protected by the First Amendment; an expressive message on a t-shirt, hat, or bumper sticker also may be protected by the First Amendment.[5]

Lower court case law reveals the range of speech that has accompanied lawful arrests. Examples include the lawful arrest of a local activist/publisher for taking goods from a local market,[6] the lawful issuance of more than two dozen citations to a self-described "pain in the neck,"[7] the lawful arrest of an unsuccessful mayoral candidate for assault in a

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[2] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[3] *Cohen v. California*, 403 U.S. 15 (1971).

[4] *Texas v. Johnson*, 491 U.S. 397 (1989).

[5] *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

[6] *Singer*, 63 F.3d at 12-13.

[7] *Williams*, 480 F.3d at 874-75.

barroom brawl,[8] the lawful arrest of a bar owner for playing amplified music without a permit after he incited the disappointed crowd to begin an obscene chant,[9] the lawful arrest of a sidewalk preacher for disorderly conduct,[10] and the lawful arrest of a gun brandishing citizen who accused a conservation officer of failing to do his job.[11]

There are probably no better and more current examples of the potential for myriad First Amendment retaliatory arrest claims than cases arising out of the "Occupy" movement. OccupyArrests.com tracks the "total number of Occupy protesters arrested around the U.S. since Occupy Wall Street began on September 17, 2011." OccupyArrests.com (Jan. 16, 2012), http:/cupyarrests.moonfruit.com/. As of January 11, 2012, the number was nearly 6,000. *Id.* Anecdotal evidence suggests that many of these arrests are supported by probable cause. *See, e.g.*, Associated Press, *Occupy Protestors Arrested at Iowa Campaign Offices*, NPR, Dec. 31, 2011, http://www.npr.org/2011/12/31/144528950/occupy-protesters-arrested-at-iowa-campaign-offices (trespass); James Lynch, *At Least Eleven Occupy Protesters Arrested in Clashes at Port of Seattle*, Q13 FOX NEWS, Dec. 12, 2011, http://www.q13fox.com/news/kcpq-occupy-protests-plan-to-blockade-port-of-seattle-20111208,0,1713059.story (throwing bags of paint at officers and police-mounted horses); *Mass Arrest at 'Occupy' Protest in Chicago*, RT.COM, Oct. 16, 2011, http://rt.com/news/chicago-protest-arrest-police-971/ (refusing to leave

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[8] *Curley*, 268 F.3d at 65.

[9] *Smithson*, 235 F.3d at 1060.

[10] *Reed*, 140 F.3d at 1380.

[11] *Barnes*, 449 F.3d at 711-13.

a park after 11PM in violation of an ordinance). Despite these violations, any "Occupy" protester could claim he or she was "really" arrested for protesting—not trespass, disorderly conduct, an ordinance violation, etc. The "Occupy" protesters represent only a small (but rapidly growing) subset of arrestees who will have a First Amendment retaliatory arrest claim unless this Court disallows such claims if the arrest was supported by probable cause.

2. Officers Who Arrest Someone for Probable Cause Rather Than His or Her Speech Will Have Difficulty Defending Themselves.

If probable cause does not bar First Amendment retaliatory arrest claims, courts will apply *Mt. Healthy* mixed-motive analysis to determine if the officer is liable. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 287 (1977). Under *Mt. Healthy*, a plaintiff must demonstrate that he or she engaged in protected speech and that the speech was a motivating factor in the defendant's decision. The defendant can defend itself by demonstrating "that it would have reached the same decision . . . in the absence of the protected conduct." 429 U.S. at 287.

As mentioned above, motivation is easy to allege but hard to disprove. It is especially hard to disprove at the summary judgment stage where the presence of protected speech in conjunction with the contested action may be sufficient to create a genuine issue of material fact. State and local police officers absorb the speech they hear—like everything else they encounter—through a public safety filter. So if a speaker is denouncing his spouse, his child, a stranger, a well-known politician, or even the officer, the officer is going to be wondering whether such

statements could lead to domestic violence, are indicative of child abuse, might lead to a breach of the peace, or are indicative of intoxication.

It is difficult for a police officer to explain—and for a court to sort out—whether the officer hearing the speech in the above paragraph was motivated by concern a crime had been or would be committed based on instincts and experience—or because the officer simply found the speech offensive. Police officers—unlike almost every other public employee other than perhaps teachers—routinely hear offensive speech and encounter offensive behavior that is often directed at them personally. It may be difficult to believe any person would not react negatively to such speech. Yet police generally have training and experience to expect this speech and not react to it or take it personally—even if it is personal. *See King*, 519 F.3d at 607 ("King's statements were not directed at Officer Ambs in any personal way, and King offers no evidence to suggest that Officer Ambs was motivated by the content of King's statements rather than the fact of the repeated obstruction.").

A second reason officers who arrest someone for probable cause and not protected speech will have difficulty defending themselves is that in the fast moving events of the streets, arrests often transpire in minutes, or even seconds. An officer has to respond to a situation he or she encounters then and there. Particularly if the arrestee is potentially dangerous, the officer will have no time to document his or her "real" reasons for the arrest. And the officer will have no time before the arrest to first consult with a colleague, a supervisor, or a therapist about whether personal bias, hurt feelings, or subconscious feelings generated by speech might "really" be

motivating the arrest rather than the obvious legal violation.

State and local police officers will have particular difficulty defending themselves when they properly rely on constitutionally protected speech in the determining whether there is probable cause to make an arrest. Probable cause is a totality of the circumstances inquiry. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Protected speech is not exempt from the probable cause inquiry. Indeed, there are circumstances in which constitutionally protected speech *is* the "but-for" cause of a lawful arrest.

For example, Thomas Jefferson's aphorism "From time to time, the tree of liberty must be watered with the blood of patriots and tyrants" is constitutionally protected speech. Yet, when that aphorism appears on the T-shirt of a driver who has been pulled over for expired license plates shortly after a federal office building has been bombed, the constitutionally protected speech on the shirt may suggest that the young man wearing the shirt had something to do with the bombing. Was the protected speech a motivating factor in the arrest? Certainly. Would the arrest have been made in the absence of the protected speech? Perhaps not. Under the *Mt. Healthy* framework, how will the officer in this situation be able to defend a First Amendment claim when constitutionally protected speech was relied on in the probable cause inquiry—and properly so?

3. The Presence of Constitutionally Protected Speech May Deter Officers From Making Lawful Arrests.

If this Court rules First Amendment retaliatory arrest claims are not barred by probable cause a state

or local police officer will know that a shop lifter or even a bank robber wearing an "Cops Suck" t-shirt may later "realize" he or she has a First Amendment retaliatory arrest claim. Officers, who usually have discretion to not arrest, should not be put in the position where doing the right thing—making the arrest regardless of the speech—will possibly subject them to a lawsuit for money damages.

Officers might be most reticent to arrest where, as described in the section immediately above, the constitutionally protected speech is a contributing factor to the probable cause analysis because these claims will be the hardest to defend. However, case law suggests that constitutionally protected speech often is indicative of the possibility a very serious crime may be committed. *See, e.g., Fogel v. Collins*, 531 F.3d 824, 827 (9th Cir. 2008) (police called to investigate van with the words "I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST" "PULL ME OVER, I DARE YA" written on back); *Ponce v. Socorro Independent School District*, 508 F.3d 765, 767 n. 1 (5th Cir. 2007) (high school student arrested after discovery of notebook that, among other things, detailed plans for Columbine style attack on local high school). Similarly, political assassination and crimes of terror are crimes of ideology that may be revealed through the constitutionally protected statements of the perpetrator. State and local police officers may be deterred from making arrests particularly where constitutionally protected speech contributes to the probable cause analysis of very serious possible crimes, unless this Court adopts a no-probable-cause rule for retaliatory arrest claims.

4. Savvy Arrestees May Purposefully Engage in Constitutionally Protected Speech to Avoid Arrest.

Unfortunately, many arrestees may be savvy, having been arrested multiple times. *See Recidivism*, OFFICE OF JUSTICE PROGRAMS, http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17 (last visited Jan. 16, 2012) ("[o]f the 272,111 persons released from prisons in 15 states in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years"). A savvy arrestee—particularly one who has been arrested for a petty or more vague offense (like disorderly conduct)—will know that he or she can create a First Amendment case by simply stating something awful or politically charged to the officer, unless this Court bars First Amendment retaliatory arrest claims based on probable cause.

The officer might think twice about arresting the person in light of a possible lawsuit. Even if the officer knows he or she likely would win because a First Amendment case would be weak, defending any lawsuit will be expensive, time consuming, and damaging to his or her career. At best, a savvy arrestee will now have a bargaining chip—a potential First Amendment lawsuit—in negotiating a sentence for his or her underlying offense, which will lead to a lower sentence. At worst, the police officer will simply abandon the arrest. Either result is detrimental to public safety and illustrates how the legitimate authority of state and local police is undermined.

B. True Victims of First Amendment Retaliatory Arrest Claims Have Recourse Other Than Litigation.

Where a police officer admits the real reason he or she arrested a person was protected First Amend-

ment speech or it is completely obvious (for example, the only drunken college students a campus police officer arrested for the entire year wore t-shirts with similar political messages), litigation is not the citizen's only option for seeking consequences for the First Amendment violation. The citizen also may complain to the police department employing the officer about the First Amendment violation. If the complaint has merit, the offending officer likely will be disciplined.

State and local law enforcement officers are required to comply with federal and state laws, local ordinances, and department rules and regulations or they are subject to discipline. Most police departments—in big and small cities—have established procedures for receiving and processing complaints against police officers. *See, e.g., How to File a Complaint*, CITY OF CHICAGO INDEPENDENT REVIEW AUTHORITY, http://www.iprachicago.org/howtofile.html (last visited Jan. 16, 2012); *Forms and General Information*, CITY OF MT. PLEASANT, MICHIGAN, http://www.iprachicago.org/howtofile.html (last visited Jan. 16, 2012) (Mt. Pleasant, Michigan is a city of about 26,000 people). Big cities like Washington, D.C., have entire offices dedicated to receiving and investigating complaints against police officers. OFFICE OF POLICE COMPLAINTS (Jan. 16, 2012), http://policecomplaints.dc.gov/occr/site/default.asp. At least one state, California, requires all police departments in the state to adopt written complaint procedures. *See Personnel Complaint Procedure*, SACRAMENTO POLICE DEPARTMENT, http://www.sacpd.org/contact/complaint/ (last visited Jan. 16, 2012) (discussing CAL. PENAL § 832.5(a) which states: "Each department or agency in this State which employs peace officers shall establish a procedure to investi-

gate citizens' complaints against the personnel of such departments or agencies, and shall make a written description of the procedure available to the public."). Police department websites generally explain when and how to file a complaint, provide a complaint form, explain when and how the complaint is investigated, what the results of the investigation might be, when and how the complainant will be notified of the results, and what appeal procedure is available. *See, e.g., City of Rochester*, ROCHESTER POLICE DEPARTMENT CITIZEN COMPLAINT PROCESS, http://www.cityofrochester.gov/rpdcomplaintprocess/ (last visited Jan. 16, 2012).

Violation of federal law generally appears to be grounds for a valid complaint against a police officer. *See, e.g., Police Department*, TOWN OF MADISON, http://www.town.madison.wi.us/police/complaint.html (last visited Jan. 16, 2012) ("Complaints can be filed if you believe a police officer employed by the Town of Madison has violated a department rule, town ordinance, state or federal law, or standards of acceptable conduct."). Consequences for a valid complaint generally include disciplinary action against the offending officer or criminal charges if appropriate or a change in department policy. *See, e.g., Citizen Complaints*, CITY OF MILWAUKEE, http://city.milwaukee.gov/Police/CitizenComplaints.htm (last visited Jan. 16, 2012) ("If the Chief of Police determines there is a violation of Department Rules and Procedures, federal or state laws, ordinances of the city of Milwaukee, or policies and procedures of the Milwaukee Police Department, criminal charges will be sought, disciplinary action and or a change of policy may result.").

In short, where a police officer admits (or it is obvious) he or she arrested a citizen in violation of his or her First Amendment rights—even if probable cause exists for the arrest—in most, if not all, jurisdictions a citizen will be able to bring a complaint to the police department about the violation. If violations of federal law are actionable under the department's complaint procedure it is likely the offending officer will be disciplined. While a sustained complaint against a police officer will not result in money damages it may lead to a change in behavior by the arresting officer and even the entire police department.

C. The Rationale of *Hartman* Extends to Retaliatory Arrest Claims.

In *Hartman*, this Court held that a plaintiff could not maintain a retaliatory prosecution action unless he or she could show the absence of probable cause for bringing the underlying criminal charges. The Court based this conclusion on three grounds: (1) evidence of probable cause is relevant to determining the motive for the prosecution, 547 U.S. at 259-61; (2) evidence of probable cause can help bridge a chain of causation, *id.* at 261-65; and (3) there is a presumption of prosecutorial regularity, *id.* at 263. All three grounds also justify holding that an absence of probable cause to arrest is an element of a retaliatory arrest claim.

First, evidence of probable cause supports the validity of a challenged arrest every bit as much as it supports the validity of a challenged prosecution. "Because showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to

require such a showing as an element of a plaintiff's case." *Hartman*, 547 U.S. at 265-66.

Second, evidence of probable cause helps bridge the chain of causation in retaliatory arrest cases. As this case demonstrates, the notion that retaliatory arrest cases inevitably will have a direct chain of causation ignores that arrests often are the product of teamwork, and the arresting officer may well be acting on information provided by others. So this factor weighs in favor of extending *Hartman* to retaliatory arrest claims.

Third, the objective presence of probable cause creates an evidentiary presumption of regularity that should be extended to the first line in the criminal justice system (arrests) if it has been afforded to the second (prosecutions). Because arrest is an inevitable precursor to prosecution, and even conviction, there is something anomalous about sanctioning an officer for arresting someone who may be validly arrested, prosecuted, and convicted, while all the other representatives in the criminal justice process—prosecutor, presiding judge, and jury—have absolute immunity.

II. THE TENTH CIRCUIT ERRED IN DENYING QUALIFIED IMMUNITY TO PETITIONERS.

At the very least, Petitioners are entitled to qualified immunity. When, as here, circuit court case law has been called into question by Supreme Court case law on a related subject, that old circuit court case law cannot be deemed "clearly established" when the circuit court has yet to rule on the impact of the new Supreme Court precedent. If it is, the fundamental purposes of qualified immunity are undermined and

lay persons are effectively required to accurately predict the legal rulings of judges.

Qualified immunity is available to a government defendant so long as the defendant's actions do not violate clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Three judgments underlie the doctrine of qualified immunity. First, there is a strong public interest in protecting public officials from the costs associated with litigation. 457 U.S. at 816. Qualified immunity allows public officials to terminate meritless claims at the earliest possible point. *Id.* at 814. Second, allegations of subjective motivation can be used to shield baseless claims from summary judgment. *Id.* at 817-18. Therefore, qualified immunity allows the public official to terminate the litigation by showing that his or her conduct was *objectively* reasonable. Finally, the objective legal reasonableness standard avoids the unfairness of imposing liability where the law is uncertain. *Id.* at 819.

All of these rationales for qualified immunity are undermined by denying it to the officers in this case who had no way of knowing the Tenth Circuit would not extend *Hartman* to retaliatory arrest claims. Tenth Circuit precedent on retaliatory arrests was no longer clearly established post-*Hartman*. Indeed, just days before the events in question here, the Sixth Circuit, which previously had agreed with the Tenth Circuit[12] that the presence of probable cause does not bar First Amendment retaliatory arrest claims, *Greene v. Barber*, 310 F.3d 889, 895-97 (6th Cir. 2002), held that *Hartman* modified its precedent, and that *Hartman*'s rule extended to First Amend-

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[12] *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990).

ment retaliatory arrest claims. *Barnes*, 449 F.3d at 719-20.

Police officers and other government officials are lay people not legal scholars or legal psychics. The Tenth Circuit's prior position that probable cause does not bar First Amendment retaliatory arrest claims had been a minority position;[13] *Hartman* arose out of a species of cases that included both retaliatory prosecutions and arrest; and one of the other minority circuits had changed its position in light of *Hartman*. Given this, it is highly doubtful that any careful attorney advising a plaintiff on the likelihood of prevailing on a First Amendment retaliatory arrest claim in the Tenth Circuit after *Hartman* would tell the client anything other than it will depend upon how the Tenth Circuit applies *Hartman*. In short, until this Court or the Tenth Circuit addressed the

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[13] *Keenan*, 290 F.2d at 262 (Fifth Circuit holding that "If probable cause existed, however, or if reasonable police officers could believe that probable cause existed, they are exonerated"); *Curley*, 268 F.3d at 73 (Second Circuit holding "because defendants had probable cause to arrest plaintiff, an inquiry into the underlying motive for the arrest need not be taken"); *Smithson*, 235 F.3d at 1063 (Eighth Circuit holding "even if this pretextual argument were proven at trial, it would not nullify the finding of probable cause to believe that Smithson was violating the sound ordinance, nor would it prevent the application of the qualified immunity defense"); *Merkle v. Upper Durbin School District*, 211 F.3d 782, 794 (3d Cir. 2000) (noting that while police had probable cause to arrest teacher based on information provided by school authorities, issue of fact remained as to whether school authorities had probable cause to pursue teacher's prosecution); *Reed*, 140 F.3d at 1383 (Eleventh Circuit stating "Because we hold that the officers had arguable probable cause to arrest Anderson for disorderly conduct, we must also hold that the officers are also entitled to qualified immunity from the plaintiff's First Amendment claims").

effect of *Hartman* on retaliatory arrest cases, the law in the Tenth Circuit would remain unsettled. Petitioners here made the arrest while the law was still unsettled and should have been afforded qualified immunity.

CONCLUSION

In *Hartman*, this Court held that a plaintiff bringing a cause of action claiming that he or she was prosecuted in retaliation for an exercise of his or her First Amendment rights must plead and prove the absence of probable cause to support the prosecution. For the reasons stated above, there is no basis for applying a different rule to retaliatory arrest cases.

The decision below should be reversed.

Respectfully submitted,

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to plead and prove the absence of probable cause. It would be incongruous to permit respondent to proceed on a retaliatory-arrest claim similarly premised on Agent Doyle's allegedly retaliatory animus without any need to demonstrate the absence of probable cause. See *Hartman*, 547 U.S. at 262-263 (citing cases raising challenges to prosecutions based on inducement of police officers).

More fundamentally, even when only a single officer's actions are at issue, the causation inquiry in arrest cases—as in prosecution cases—will still "usually [be] more complex than it is in other retaliation cases." *Hartman*, 547 U.S. at 261. For instance, in the case of a standard retaliation claim by a public employee "that he was fired for speech criticizing the government," *id.* at 259, a close temporal proximity between the plaintiff's expressive activity (say, a letter to a newspaper editor) and the adverse governmental action will typically provide at least some support for the plaintiff's prima facie claim of unlawful retaliation, see *id.* at 259-260. The same is not true in the arrest context. Rather, a suspect's expressive activity will often be an entirely legitimate, or even necessary, factor for the officer to take into account in deciding whether to make an arrest.

In some cases, expressive activity may provide evidence of a crime and thus bear directly on the probable-cause determination. See, *e.g.*, *Hunter*, 502 U.S. at 228 (considering suspect's statements in addressing probable cause to arrest him for threatening the President); *Wayte* v. *United States*, 470 U.S. 598, 612-613 (1985) (noting that protest letters written to the Selective Service "provided strong, perhaps conclusive evidence" of an element of the criminal offense of failing to register for the draft). Even more frequently, expressive activity

will be relevant to an officer's decision concerning whether an arrest would make sense under the circumstances. Officers do not—and could not—take into custody every person whom they could lawfully arrest, and there is accordingly a "well established tradition of police discretion" in deciding whether a custodial arrest is warranted. *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 760 (2005); see also *Chicago* v. *Morales*, 527 U.S. 41, 62 n.32 (1999) (observing that it is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances"). The Court has never held that officers are forbidden from considering a suspect's expressive activity in making that discretionary decision, nor would such a rule be sensible. Cf. *Wayte*, 470 U.S. at 614 (rejecting interpretation of the First Amendment that "would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law").

In deciding whether to arrest someone for trespassing on government property, for example, an officer should be able to consider that a suspect who belligerently states, "the government has no right to own property," is less likely to leave promptly of his own accord than a suspect who immediately apologizes and explains that he was simply taking a shortcut home. Similarly, in this case, it was both legitimate and prudent for petitioners to take account of respondent's vocal criticism of the Vice President as part of the totality of circumstances in assessing whether respondent presented a threat to the Vice President and should be arrested and removed from the area. Secret Service agents can reasonably, and lawfully, conclude that someone whose disagreement with the Vice President has already led to

unsolicited physical contact presents more of a security risk than someone who, for example, bumped into the Vice President accidentally. See Pet. App. 8 (Agent Reichle's testimony that he arrested respondent based upon his "premeditation, the conversation on the cell phone, the fact that [respondent] would not talk to [him], the fact that he's walking around with a bag in his hand in an [area without a metal detector], and the fact that [Agent Doyle said] that he had unsolicited contact" with the Vice President).

It will often be quite difficult, however, for judges and juries to distinguish permissible arrest-related consideration of expressive activity from retaliation. An officer's honest admission that expressive activity played a part in his arrest decision can easily be used against him. Indeed, the court of appeals in this case construed such an admission by Agent Reichle as evidence supporting an inference of retaliation. Pet. App. 26. This complexity in establishing causation renders the reasoning of *Hartman* fully applicable to retaliatory-arrest cases.

As in *Hartman*, the complexity "should be addressed specifically in defining the elements of the tort," 547 U.S. at 265, because the jury (and the district court, when it addresses a dispositive motion) will otherwise lack any consistent, objective criterion for distinguishing lawful from unlawful government action. As the Court explained in *Hartman*, "[b]ecause showing an absence of probable cause will have high probative force, and can be made mandatory with little or no added cost, it makes sense to require such a showing as an element of a plaintiff's case." *Id.* at 265-266. And also as in *Hartman*, the Court should make that requirement a blanket rule for all retaliatory-arrest cases (including those that may not

present the same degree or kind of causal complexity as this one), rather than invite difficult line-drawing problems about which cases are sufficiently complex to necessitate it. *Id.* at 261, 264 & n.10. Indeed, a probable-cause standard would have significant benefits even in relatively straightforward cases, because it provides a well-established and easily administrable way of striking the appropriate balance between the interest in protecting individuals from unreasonable law-enforcement interference and the public-safety interest in enabling officers to enforce the law. *E.g.*, *Pringle*, 540 U.S. at 370.

3. This case, moreover, presents an additional consideration, not present in *Hartman*, that counsels in favor of requiring a plaintiff to plead and prove the absence of probable cause: the common law's reliance on that factor in analogous contexts. The Court has recognized that "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights," and that those preexisting rules are often useful in defining the contours of constitutional torts. *Carey* v. *Piphus*, 435 U.S. 247, 257-258 (1978); see *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994). The Court accordingly acknowledged in *Hartman* that the common law can at least serve "as a source of inspired examples" in the *Bivens* context. 547 U.S. at 258. In that case, however, the Court found no clear guidance from the common law, observing that "we could debate whether the closer common-law analog to retaliatory prosecution is malicious prosecution (with its no-probable-cause element) or abuse of process (without it)." *Ibid.*

But at least for retaliatory-arrest cases that, like this one, do not involve a warrant, the common-law analogue is much clearer. A warrantless arrest would not provide the basis for a common-law abuse-of-process claim, because it does not involve legal "process," which generally is defined to require some sort of interaction with a court. See Restatement (Second) of Torts § 682 (1977) (element of abuse-of-process torts is "us[ing] a legal process") (Second Restatement); *Black's Law Dictionary* 1085 (5th ed. 1979) (defining "legal process" to mean "a summons, writ, warrant, mandate, or other process issuing from a court" and defining "criminal process" by reference to a warrant); see also 3 Dan B. Dobbs et al., *The Law of Torts* § 594, at 420-422 (2d ed. 2011) (discussing definition of "process" in context of abuse-of-process tort) (Dobbs). Rather, a warrantless arrest might be actionable at common law in one of two ways. First, the arrestee might allege that there was no legal authority to arrest him, in which case his claim would be for false imprisonment. Second Restatement §§ 35, 41 (1965), 654 cmt. e; see also Dobbs § 41, at 104. Second, the arrestee might allege that even if there was legal authority to arrest him, that authority was invoked maliciously, in which case his claim would be for malicious prosecution. Second Restatement § 654 cmt. e.

Neither common-law option would generally impose damages liability on an officer who made a warrantless arrest based on probable cause. The absence of probable cause is an element of a malicious-prosecution tort. Second Restatement § 653; see, *e.g.*, *Hartman*, 547 U.S. at 258; *Heck*, 512 U.S. at 485 n.4. And the presence of probable cause is a defense to a false-imprisonment tort. A defendant in a false-imprisonment case can avoid liability by showing that he made a "privileged" arrest,

Second Restatement § 118 & cmt. b (1965); Dobbs § 94, at 289-290, and a "peace officer" would be privileged to arrest someone whom he "reasonably suspects" has committed a felony or who breaches the peace in his presence. Second Restatement §§ 114, 119(b)-(c), 121(a)-(b) (1965); see also Dobbs § 94, at 291-293.*

Any retaliatory motive that an officer might have in making a warrantless arrest would typically be irrelevant if probable cause were present. It has long been the rule that "if there was probable cause, an action for malicious prosecution will not lie, although the party who procured the arrest or indictment was actuated by malicious motives." *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390, 402 (1851); see also 3 William Blackstone, *Commentaries* 127 (1768). And in the false-imprisonment context, "the fact that [an officer] has an ulterior motive * * * does not make the arrest unprivileged" so long as the arrest is made in the course of enforcing the law (and not, say, simply to pressure the suspect into performing a service for the officer as a condition of release). Second Restatement § 127 cmt. a (1965). So, for example, if "A, a traffic officer, arrests B for driving at

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* The common-law rule arguably could be read to require that the officer subjectively intend to arrest the suspect for the specific crime for which probable cause objectively existed. This Court has, however, rejected such a requirement in the Fourth Amendment context. See *Devenpeck* v. *Alford*, 543 U.S. 146 (2004). And even if such a requirement applied here, petitioners would still be shielded from liability, because respondent's unsolicited physical contact with the Vice President provided probable cause for the assault crime that petitioners had in mind when they arrested him. See Pet. App. 8; 18 U.S.C. 1751(e) (criminalizing an "assault[]" on the Vice President); Wayne R. LaFave, *Criminal Law* §§ 16.2-16.3, at 816, 823 (4th ed. 2003) (traditional definition of "assault" includes "attempted battery," and traditional definition of "battery" includes "offensive touching").

the rate of 20 miles an hour through a town in which the rate of speed is fixed by an ordinance at 15 miles an hour," the arrest is privileged (and thus no false-imprisonment liability attaches), even if A made the arrest "because B was a personal enemy, or because B had previously reported him for his failure to arrest persons driving at 25 miles an hour." *Id.* § 127 cmt. a, illus. 1 (1965).

Under the court of appeals' decision, however, a plaintiff in those circumstances could impose liability on the officer by couching his claim in constitutional terms. There is no reason why the definition of the constitutional tort should so sharply depart from the common law's guidance. Particularly in light of *Hartman*'s causation-related considerations, it makes sense to incorporate the probable-cause inquiry in the constitutional context not merely as an affirmative defense (as it is for false imprisonment), but as an element of the claim (as it is for malicious prosecution). The same practical considerations that have informed the development of the common law are equally present here. See *Heck*, 512 U.S. at 483. And requiring consideration of probable cause at the earliest possible stage of the case protects innocent officers to the maximum extent from the burdens of discovery and trial. See *Iqbal*, 129 S. Ct. at 1945-1947.

B. At A Minimum, Petitioners Are Entitled To Qualified Immunity Because They Reasonably Could Have Believed Their Conduct Was Lawful

Not only did the court of appeals err in concluding that an arrest supported by probable cause could give rise to a retaliatory-prosecution claim, but it compounded that error by denying petitioners qualified immunity. "[T]o ensure that fear of liability will not 'unduly inhibit officials in the discharge of their duties,'" the qualified-immunity doctrine provides that "so long as they have not violated a 'clearly established' right," officials "are shielded from personal liability." *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (citations omitted).

This Court has never held that an arrest supported by probable cause can violate the First Amendment. The court of appeals therefore relied solely on its own circuit precedent to conclude that the unconstitutionality of petitioners' conduct was "clearly established" and that qualified immunity was unavailable. See Pet. App. 34-35 & n.14. Its reasoning was critically flawed in two primary respects. First, the circuit precedent on which it relied predated *Hartman*, whereas the arrest in this case did not. See *id.* at 34 n.14; compare *Hartman*, 547 U.S. at 250 (decided April 2006), with Pet. App. 3 (respondent's arrest in June 2006). Even if this Court were to reject the contention that *Hartman*'s reasoning translates equally well (if not better) to retaliatory-arrest claims, see Part II.A, *supra*, that decision certainly could have led a reasonable officer to believe that an arrest supported by probable cause does not violate the First Amendment.

Second, multiple courts of appeals both before and after *Hartman* have either held or suggested that an

officer is entitled to qualified immunity from a First Amendment retaliatory-arrest claim so long as it would have been reasonable to believe that probable cause supported the arrest. See *McCabe*, 608 F.3d at 1079; *Redd* v. *City of Enterprise*, 140 F.3d 1378, 1383 (11th Cir. 1998); *Singer* v. *Fulton County Sheriff*, 63 F.3d 110, 120 (2d Cir. 1995), cert. denied, 517 U.S. 1189 (1996); see also *Phillips* v. *Irvin*, 222 Fed. Appx. 928, 929 (11th Cir. 2007) (per curiam). Those courts' treatment of the absence of probable cause as an element of a First Amendment retaliatory-arrest violation demonstrates that a contrary conclusion would not have been clear to officers in the field like petitioners. See *Safford Unified Sch. Dist. No. 1* v. *Redding*, 129 S. Ct. 2633, 2644 (2009) (judicial differences of opinion can suggest that law is not clearly established).

The court of appeals' unilateral declaration of clarity was especially inappropriate in light of the protective function that petitioners were performing when they arrested respondent. The protective duties of the Secret Service are not confined to a particular geographic locale, but instead follow the protected individuals wherever they may be. It is unreasonable, undesirable, and unrealistic to expect agents to modify their performance of their duties based on the law of the local court of appeals, or to "abide by the most stringent standard adopted anywhere in the United States." *al-Kidd*, 131 S. Ct. at 2087 (Kennedy, J., concurring). As this Court has recognized, the qualified-immunity doctrine's "accommodation for reasonable error" is "nowhere more important than when the specter of Presidential assassination is raised." *Hunter*, 502 U.S. at 229.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-262

IN THE

Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR., ET AL.

Petitioners,

v.

STEVEN HOWARDS

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF WILLIAM G. MOORE, JR., AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

William G. Moore, Jr., was respondent in *Hartman v. Moore*, 547 U.S. 250 (2006), which held that a plaintiff seeking damages for retaliatory inducement of a prosecution must plead and prove the absence of probable cause for the prosecution. This case asks whether the *Hartman* rule ought to be extended to claims of retaliatory arrest.

Although *amicus* Moore takes no position on that question, he has an interest in promoting the proper understanding of the rule announced in his case, because it continues to govern his still-pending, decades-old suit against the Inspectors of the United States Postal Service who procured Moore's baseless prosecution in retaliation for his public criticism of that agency. The D.C. Circuit has held that Moore's suit is supported by "evidence of retaliatory motive . . . close to the proverbial smoking gun," *Moore v. Hartman*, 388 F.3d 871, 884–85 (D.C. Cir. 2004), *rev'd on other grounds*, *Hartman*, 547 U.S. 250, and that "[w]hether the Postal Inspectors had probable cause is a disputed issue of fact to be decided by the jurors at trial," *Moore v. Hartman*, 644 F.3d 415, 426 (D.C. Cir. 2011). But the Inspectors even now seek to distort this Court's decision in *Hartman*—and to use the pendency of this case—in an attempt to obtain qualified immunity for their misconduct. For reasons

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[1] Counsel for all parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and nobody, other than *amicus* and his counsel, has made a monetary contribution to its preparation or submission.

explained below, their interpretation of *Hartman* is wrong, would amount to a dramatic departure from settled law, and should not be accepted—especially not in this case, which does not raise the issue.

SUMMARY OF ARGUMENT

The Court granted certiorari in this case to decide whether a *Bivens* plaintiff alleging retaliatory arrest must satisfy the rule of *Hartman v. Moore*: Must he "plead and prove" the absence of probable cause for the challenged arrest? This special "no probable cause" proof requirement was originally, in *Hartman*, mandated for claims alleging retaliatory inducement of a prosecution.

Amicus William G. Moore, Jr., the respondent in *Hartman*, takes no position on whether the rule established there should be extended to retaliatory arrests. But he does have an interest in ensuring that the *Hartman* rule, which continues to govern his still-pending litigation against agents of the U.S. Postal Service, is not mischaracterized. In Moore's case, the defendant officers have tried, thus far without success, to twist the doctrine to create a broad, novel cloak of immunity unjustified by *Hartman*'s holding or reasoning, by contending that officers are entitled not only to judgment *on the merits* if probable cause *existed*, but also to *qualified immunity* if probable cause even *arguably* so existed, *i.e.*, if an officer could have "reasonably but mistakenly" believed that there was probable cause. Yet, as the D.C. Circuit recognized in unanimously rejecting this argument, that consequence does not flow from *Hartman* and would be inconsistent with the purpose and function of qualified immunity.

In arguing for *Hartman*'s extension in this case, Petitioners have, through loose language (perhaps inadvertent), mischaracterized the *Hartman* rule as "effectively confer[ring] qualified immunity from retaliation claims on all criminal investigators and other government actors who urge prosecution, when the prosecution is supported by probable cause." Br. for Pet. at 16–17. That is *not* the correct reading of *Hartman*. However, even a proper understanding of the *Hartman* rule, if extended to retaliatory arrests, would fully support Petitioners' primary argument and require judgment in their favor.

Qualified immunity protects officers who violate constitutional rights that are not clearly established. By contrast, the *Hartman* rule (which arose in a case of retaliatory inducement of a prosecution) requires plaintiffs alleging *clear* violations of constitutional rights—namely, retaliation for protected speech—to satisfy a new, objective element, *viz.*, the absence of probable cause, as a way of overcoming difficulties of proof and weeding out damages claims that are easy to allege, difficult to dismiss, but unlikely to have merit. Probable cause suggests, or so *Hartman* reasoned, that the plaintiff's injuries (in *Hartman*, Moore's prosecution) would have occurred even absent the defendant's unconstitutionally motivated actions (in *Hartman*, the defendants' illegal manipulation of the grand-jury process and other retaliatory acts taken to induce Moore's prosecution): *Well-supported* prosecutions (or arrests) are far less likely to have been caused by forbidden retaliatory animus than ones not supported by probable cause.

All of this is defensible tweaking of the judicially created *Bivens* cause of action, but—contrary to

Petitioners' repeated but unsubstantiated assertions—has nothing whatsoever to do with First Amendment rights or qualified immunity. *Hartman* squarely reaffirmed that retaliation for the exercise of First Amendment rights is impermissible *even if* the adverse action is supported by objective grounds; it held only that damages actions will not be cognizable unless the plaintiff proves the absence of probable cause. Imposition of this additional tort element serves a reasonable policy goal, but in no way changes the long-established constitutional rule that an officer whose actions are actually motivated by retaliatory or discriminatory animus violates the Constitution, whatever their objective basis—and therefore that an officer who is shown to have done so is not entitled to the protection of qualified immunity.

While it should be aware of these implications as it considers extension of *Hartman* to the retaliatory-arrest context, this Court need not address this question now. In this case, probable cause is undisputed, and so if the *Hartman* rule applies, Respondent's *Bivens* suit fails *on the merits*. The question whether qualified immunity would have been available, let alone available upon a lesser showing of "arguable" probable cause, is thus not implicated here, and so need not be resolved.

ARGUMENT

I. THE *HARTMAN* RULE PROVIDES NO BASIS FOR QUALIFIED IMMUNITY

In *Hartman v. Moore*, this Court decided that it "ma[de] sense" to structure the cause of action, under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for retaliatory inducement to prosecute, by adding, "as

an element of a plaintiff's case," a requirement that he "plead and prove" the absence of probable cause for his prosecution. 547 U.S. at 265–66. The Court is now considering whether to demand the same of plaintiffs alleging retaliatory *arrest*.

Whether the Court decides to extend the *Hartman* rule or not—a question on which *amicus* takes no position—the "no probable cause" requirement is at most an *element* of the constitutional *tort*, not a *limit* on the constitutional *right*. Requiring a showing of no probable cause does not mean that retaliation is constitutionally permissible if probable cause exists. It means only that probable cause, as an objective standard, is a useful proxy for proving causation and for weeding out likely meritless damages claims. As *Hartman* reaffirmed, *id.* at 256, the constitutional standard remains focused on whether the official acted with a retaliatory motive.

As such, while probable cause might be grounds to dismiss a *Bivens* suit (like this one) *on the merits*, it does not follow that probable cause, let alone "arguable" probable cause, provides grounds for *qualified immunity*. Immunity protects officers who act reasonably in the face of confusion over constitutional rights—not those alleged to have violated clearly established rights through their own illicit retaliatory animus.

A. Officers Who Violate Clearly Established Constitutional Rights, Such As By Acting For Forbidden Reasons, Are Not Protected By Qualified Immunity

Qualified immunity asks whether an objectively reasonable officer would have understood his actions to violate the Constitution; its purpose is to protect

officers who unwittingly intrude upon poorly or vaguely defined constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815–19 (1982). Where, by contrast, the Constitution is violated if an officer acts for *forbidden reasons*, qualified immunity ordinarily would not shield him from liability; there is no "unfairness [in] holding one accountable for actions that he or she knew, or should have known, violated the constitutional rights of the plaintiff." *Crawford-El v. Britton*, 523 U.S. 574, 591 (1998).

Exemplifying the former situation, all officers should know that while searching a home without a warrant is ordinarily impermissible, such a search is constitutional if there exist "exigent circumstances." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). But, in the heat of the moment, even well-meaning officers might "reasonably but mistakenly conclude" that circumstances are, in fact, exigent; "in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable." *Id.* The officers' objective *actions* were unlawful, but that would not necessarily have been clear to them at the time.

As an example of the latter situation, the Equal Protection Clause prohibits official acts taken for discriminatory reasons, even if those acts would—if taken for other reasons—be perfectly legitimate. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (discriminatory license denials); *Batson v. Kentucky*, 476 U.S. 79, 85–89 (1986) (discriminatory exercise of peremptory challenges); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–21 (2007) (discriminatory assignment of students to schools). Likewise, the First Amendment prohibits

retaliation if taken on account of protected speech, even if the same adverse action would be otherwise unobjectionable. *See, e.g.*, *Wayte v. United States*, 470 U.S. 598, 608 (1985) ("the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights" (citations and internal quotation marks omitted)); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 283–84 (1977).

Where this Court's precedents clearly establish the unconstitutionality of acting based on a specific motive—such as discrimination based on race or retaliation for protected speech, *see Wayte*, 470 U.S. at 608—there is ordinarily no place for qualified immunity, and certainly not by reference to the *objective* validity of the conduct. Because the officer is alleged to have acted with a prohibited motive, he cannot claim to have acted "reasonably." As this Court explained in *Crawford-El*, plaintiffs who claim retaliation are "alleg[ing] misconduct that was plainly unlawful," and there is thus no "obvious unfairness in imposing liability"; the officer "knew, or should have known," that acting on such motives "violated the constitutional rights of the plaintiff." *Crawford-El*, 523 U.S. at 591. The Court, accordingly, squarely rejected the contention that an officer should receive immunity if his acts are *objectively* justified, calling that an "unprecedented proposal." *Id.* at 593–94. Because "improper intent" defines the constitutional right and violation, officers alleged to have acted with such intent cannot be

"immunize[d]" while "the merits of a claim that [he] knowingly violated the law are being resolved." *Id.*[2]

B. The *Hartman* Rule Adds An Objective Element To Torts Alleging Violation of *Clearly Established* Constitutional Rights

Qualified immunity protects officers who violated constitutional rights that were *not* clearly established. By contrast, the *Hartman* rule shields from liability officers who acted for plainly forbidden reasons, violating *clearly established* rights. It does so for special reasons of policy: By superimposing an objective "no probable cause" element onto *Bivens* retaliation claims, the *Hartman* rule of proof seeks to overcome a particular "difficulty" in "the need to prove a chain of causation from animus to injury," *Hartman*, 547 U.S. at 259, thereby filtering out cases in which something other than the officer's illicit animus, such as a prosecutor's independent decision, was the likely cause of the harm to the plaintiff. Unlike the qualified immunity defense, this does not excuse—much less legitimize—the retaliation, which is unlawful even if it was objectively justifiable.

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[2] This does not mean, of course, that simply alleging unlawful purpose is enough to reach a jury. As *Crawford-El* pointed out, a defendant can still obtain immunity if it was not clear when he acted that his motives were prohibited—*e.g.*, if there was doubt "whether a plaintiff's speech was on a matter of public concern" and thus protected. 523 U.S. at 593. Further, a claim of unlawful motive fails on the pleadings if it is not "plausible." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009). And, even a defendant who violated clearly established rights could procure a dismissal if his violation did not proximately cause any damages. *See Crawford-El*, 523 U.S. at 593.

1. *The Court in* Hartman *required proof of "no probable cause" as a proxy for causation in the unique context of retaliatory inducement to prosecute*

In *Hartman*, this Court recognized that the conduct allegedly committed by the petitioners—*viz.*, "[o]fficial reprisal for protected speech"—unquestionably "'offends the Constitution.'" 547 U.S. at 256 (quoting *Crawford-El*, 523 U.S. at 588 n.10). The Court further observed, however, that to succeed in obtaining damages for this type of unconstitutional conduct, a *Bivens* plaintiff must also "show a causal connection between a defendant's retaliatory animus and subsequent injury." *Id.* at 259. In the unique context of retaliatory inducement to prosecute, that causal link is especially complex, as the defendant "will be a nonprosecutor . . . who may have influenced the prosecutorial decision but did not himself make it." *Id.* at 262. So even if the defendant officer acted improperly by pursuing an individual's prosecution in retaliation for his protected speech, the plaintiff was not harmed by that unconstitutional conduct if prosecution would anyway "have been initiated without his urging." *Id.* In such a case, the unlawful, retaliatory conduct did not *cause* the prosecution from which the plaintiff's injuries arose.

Hartman further observed that, in retaliatory-inducement-to-prosecute cases, "there will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Id.* at 261. In other words, the existence of probable cause "will suggest" that

prosecutors would have pursued the prosecution whether or not the defendant had—for improper, retaliatory reasons—pressed them to do so. *Id.* And, conversely, if no probable cause existed, that would have "powerful evidentiary significance," strongly suggesting that the defendant's unlawful behavior *did* induce the decision to pursue the injurious prosecution. *Id.* The presence or absence of probable cause is thus a handy, objective proxy for the ultimate tort-law question of causation.

Exercising its judicial discretion under *Bivens* to "make the kind of remedial determination that is appropriate for a common-law tribunal," *Bush v. Lucas*, 462 U.S. 367, 378 (1983), this Court therefore ruled that "the complexity of causation in a claim that prosecution was induced by an official bent on retaliation should be addressed specifically *in defining the elements of the tort*," by "requir[ing]" the plaintiff to prove "absence of probable cause" as part of his claim. *Hartman*, 547 U.S. at 265–66 (emphasis added). That is, the Court "structur[ed]" the *Bivens* claim to account for unique causation issues posed by this type of claim. *Id.*; *cf. Mt. Healthy*, 429 U.S. at 286 ("a test of causation . . . distinguishes between a result caused by [the] constitutional violation and one not so caused").

2. In retaliatory-arrest cases, requiring proof of "no probable cause" would allow for dismissal of likely meritless cases

Since *Hartman*, courts have divided over whether its reasoning applies in the context of retaliatory arrests. *See* John Koerner, Note, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755 (2009). Obviously, the

unique two-actor chain of causation that operates in retaliatory-inducement-to-prosecute cases is not replicated in retaliatory arrest cases; there is only one officer, and he arrests the plaintiff (allegedly) based on forbidden, retaliatory motives.

This Court may nonetheless decide to extend the special *Hartman* rule to the single-actor arrest scenario. While the rule's rationale does not apply with as much force to the arrest context, it remains true that here, as in *Hartman*, the *Bivens* plaintiff must prove not only retaliatory motives but also that those motives caused his arrest. If they did not, the plaintiff should not be entitled to damages; that would put him "in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mt. Healthy*, 429 U.S. at 285. And, here as in *Hartman*, there "will always be a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause" for the arrest. *Hartman*, 547 U.S. at 261. Probable cause arguably "suggests" that the arrest would have occurred even absent the alleged unconstitutional motives, while the absence of probable cause arguably "suggests" the opposite.[3]

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[3] Of course, if a plaintiff challenges the validity of an arrest only under the *Fourth* Amendment, then the requirement to show an absence of probable cause derives from the constitutional right itself, *i.e.*, from the right to be free from seizures not backed by probable cause. *See supra* at 6; *see also infra* at 18. In such a case, and unlike a retaliation case, the presence of probable cause means there was no constitutional violation.

Once again, this Court may see the *objective* standard of probable cause as a readily available, rough proxy for whether an (alleged) clearly established constitutional violation caused harm to a plaintiff. Requiring that it be disproved, as an element of the retaliation tort, would thus arguably allow the weakest claims of injurious retaliation to be dismissed before trial, as a matter of law, dispensing with the need for a costly, factbound inquiry into the constitutionally dispositive intent of the arresting officer. As such, it would—or so this Court might well conclude—"mak[e] sense" to once again "defin[e] the elements of the tort" to require the *Bivens* retaliation plaintiff to "plead and prove" the absence of probable cause for his arrest. *Id.* at 265–66.

3. In neither case does proof of an objective basis negate the constitutional violation or validate the official's alleged acts

Critically, in neither the retaliatory-inducement-to-prosecute nor the retaliatory-arrest context does the requirement to prove the absence of probable cause change the definition of the First Amendment right. It is beyond dispute that any official action *actually* taken by virtue of animus toward protected speech violates the constitutional rights of the speaker—whether or not a reasonable officer *could have* taken that same action on legitimate grounds. For good reason, that has always been the law, *see supra* at 6–7, and *Hartman* in no way suggests anything else; it held only that a *Bivens* plaintiff cannot recover *damages* caused by retaliation—*even if* he has alleged a violation of his clearly established First Amendment rights—unless he can *also* show absence of objective basis for the adverse action. It

did so, as explained, because this Court thought it would "make sense," *Hartman*, 547 U.S. at 265–66, due to evidentiary difficulties, to thereby filter out cases in which the alleged unconstitutional acts *probably* did not occur or *probably* did not cause injury—not due to any doubt over whether those alleged acts were indeed unlawful or clearly so.

Indeed, *Hartman* squarely rejected the argument that an objective basis for a prosecution means that retaliatory inducement toward it is permissible. The Government's principal argument in *Hartman* was that "a prosecution motivated by the defendant's speech does not violate the First Amendment if there was probable cause for the charges." Pet. Br. at 16, *Hartman*, 547 U.S. 250. This Court firmly disagreed, holding instead that "the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out"—even if the very same actions "might well be unexceptionable if taken on other grounds." 547 U.S. at 256. To support this "settled" proposition, the Court cited, among other authorities, *Crawford-El*, *Perry*, and *Mt. Healthy*. *Id.*

The Government's *fall-back* argument in *Hartman* was that, "[e]ven if the First Amendment were violated whenever a retaliatory motive was the but-for cause of a prosecution, a cause of action for damages under *Bivens* should not lie if probable cause existed." Pet. Br. at 17, *Hartman*, 547 U.S. 250. And that, as explained, is exactly the argument that this Court accepted, deciding that even if the plaintiff has properly alleged a clear violation of the First Amendment, it would "make sense" to

"structure" the *Bivens* claim to demand a showing of no probable cause, too. 547 U.S. at 264 n.10, 265–66.

Hartman thus reaffirmed that the constitutional standard turns solely on the retaliatory motives for the official's conduct, even while imposing a new, objective threshold for plaintiffs seeking money damages for proscribed retaliation. And if this Court now extends the *Hartman* rule to retaliatory arrests, it will likewise be the result of a policy determination based on the costs and benefits of narrowing the judicially created *Bivens* remedy in this context—not because of any doubt over the "settled" principle that retaliation for protected speech is *always* prohibited, without regard to its objective defensibility.

None of this is surprising. The notion that retaliatory action could actually be *permissible* if objectively well-founded is not just contrary to long-standing doctrine, but would have dramatic effects well beyond the *Bivens* context. If retaliation is constitutional so long as there exists an objective basis (like probable cause) for the adverse official action, the broad guarantees of the First Amendment are debased: A plaintiff would not even be entitled to an *injunction* were a local police department to announce, for example, that it would henceforth pull over all cars with broken tail lights—but only if a license-plate search revealed that the driver was Republican, or Communist, or, for that matter, of a certain race. In such a case, there would always be probable cause for the seizure, but such policy—of taking action based on the specific, forbidden basis of an individual's race or protected political speech—would also indisputably be retaliatory or discriminatory, and clearly unconstitutional.

In sum, the *Hartman* rule—in whatever context—does not remotely change the long-established, well-settled rule that even objectively valid action violates the Constitution if the government official took the action based on proscribed motives, like retaliation for protected speech or discrimination against protected characteristics. Rather, the no-probable-cause proof requirement allows even officers who are alleged to have violated this clearly established constitutional rule to escape damages liability if the *Bivens* plaintiff cannot satisfy an added, objective threshold that is, at most, a rough proxy for whether the alleged violation actually harmed him.

C. In Retaliation Cases, Probable Cause Can Therefore Be Grounds For Judgment On The Merits, But "Arguable" Probable Cause Cannot Be Grounds For Qualified Immunity

The above discussion should make clear why, even if the *Hartman* rule applies and the defendant is thus entitled to judgment on the merits if there existed probable cause for his allegedly retaliatory acts, the same defendant would have no entitlement to qualified immunity—and surely not on a mere showing that probable cause "arguably" existed. The reason is the crucial difference between the *definition* of a constitutional *violation* and the *elements* of a constitutional *tort*. Petitioners simply fail to grapple with this distinction, assuming throughout their brief that failure to satisfy the *Hartman* "no-probable-cause" element "effectively confers" qualified immunity, Pet. Br. at 16—even though such an assumption is unnecessary to the majority of their arguments, *see infra* Part II.

In those cases where a constitutional violation occurs only if an objective condition is met—*e.g.*, under the Fourth Amendment, which "generally requires a law enforcement officer to have probable cause" before conducting a search, *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009)—then any reasonable doubt over satisfaction of that condition entitles an official to immunity even if he *did* violate the right; he cannot fairly be blamed because probable cause "arguably" existed for the search, such that the constitutional violation was not clear at the time. *See Malley v. Briggs*, 475 U.S. 335, 345 (1986); *see also supra* Part I.A.

By contrast, where a constitutional violation turns not on an objective condition but rather on the officer's *motive*—*e.g.*, his intent to retaliate for speech—then the officer's conduct cannot be excused and qualified immunity cannot be invoked. The officer may still be saved from damages liability if the plaintiff fails to adduce evidence of some other element of the *Bivens* cause of action—such as proximate causation or damages—but such failure of proof in no way validates the officer's conduct, which violated *clearly established* rights. Put another way, an officer's argument that he "did not in fact cause the alleged wrong is not an argument that he is entitled to immunity, but rather is an argument that he is not liable." *Bonitz v. Fair*, 804 F.2d 164, 174 (1st Cir. 1986); *see also Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003) (per curiam); *McLaughlin v. Alban*, 775 F.2d 389, 391–92 (D.C. Cir. 1985) (per curiam). That the violation did not cause the harm hardly justifies the conduct, or suggests that the plaintiff would have been unable to obtain an injunction to prevent it; it merely means that he

cannot succeed on a claim for damages after the fact. And since the plaintiff's failure to establish an element of his claim does not imply immunity for a defendant who allegedly violated clearly established rights, it is true *a fortiori* that a plaintiff's "arguable" failure to do so *certainly* does not create immunity.

As shown above, the *Hartman* rule requires proof of the absence of probable cause as part of the *Bivens* tort, not as an aspect of a constitutional violation. Thus, while probable cause defeats a *Bivens* claim for First Amendment retaliation (like Respondent's, if *Hartman* applies) on the merits, *arguable* probable cause no more entitles a defendant to immunity than would "arguable" lack of damages, "arguable" flaws in the chain of causation, or "arguable" doubts about the identity of the perpetrating officer. All of these go to liability, to elements of the constitutional tort, but *not* to the definition of the constitutional right or the existence of the constitutional violation—and only the latter matters for the qualified-immunity defense. *See Crawford-El*, 523 U.S. at 594 (describing as "unprecedented" the argument that officers should be immunized for retaliation claims if adverse action could have been taken on legitimate grounds).

Indeed, the thus-far unsuccessful attempt by the defendants in *amicus* Moore's case to persuade the courts that an "arguable" objective basis for action taken for clearly unconstitutional motives should result in immunity would, if accepted, lower the bar for official conduct, conflict with *Harlow*, reject *Crawford-El*, and, as a practical matter, virtually eliminates the *Bivens* cause of action for intent-based constitutional torts. Characterizing *Hartman* as an immunity rule is thus not just wrong, but dangerous.

Only one appellate court has squarely addressed this issue in a reasoned opinion, and it agreed entirely with the analysis offered here. The D.C. Circuit, in its most recent foray into *amicus* Moore's long-pending *Bivens* litigation against Inspectors of the U.S. Postal Service who procured his baseless prosecution in retaliation for his public criticism of the Service's leadership, considered the Inspectors' argument for immunity on the basis of "arguable" probable cause for the prosecution. *See Moore v. Hartman*, 644 F.3d 415, *pet. for cert. filed*, No. 11-836 (U.S. Jan. 4, 2012). Unanimously, the panel there rejected the argument. *Id.* at 423. It reasoned that, in the Fourth Amendment context, where the "keystone" of the constitutional analysis is "whether the action taken [was] based on probable cause," an officer should be immune if "he acted with arguable probable cause." *Id.* By contrast, however, "the First Amendment does not itself require lack of probable cause in order to establish a retaliatory inducement to prosecution claim." *Id.* Indeed, "nothing about the . . . right to be free from punishment [for free speech] suggests any connection between the right and criminal 'probable cause.'" *Id.* at 424. Nor did this Court in *Hartman* "purport to add no probable cause as an element of a First Amendment retaliation *violation*"; rather, it created "a special rule of proof," working the no-probable-cause requirement "into the remedial framework" as a way "to establish the requisite causal connection" between violation and injury. *Id.* Accordingly, the court held that "the absence of probable cause is not an element of the free speech right" and therefore "has no bearing" on qualified immunity. *Id.* at 425.

Although the D.C. Circuit was not convinced, the defendants in Moore's case have often pointed to a footnote in *Hartman* to try to blur the line between the definition of the right and the elements of the tort. Seeking to explain why the Court had interlocutory appellate jurisdiction to define the elements of the *Bivens* claim, the footnote said that "element[s] of the tort," such as the absence of probable cause, are "directly implicated by" the defense of qualified immunity. *Hartman*, 547 U.S. at 257 n.5. This does not mean, however, that (contrary to the body of the Court's opinion) subjective retaliation is lawful if supportable by probable cause, or that (contrary to the understanding of the lower courts) officers are immune if any element of the tort has "arguably" not been met. Rather, as two more recent decisions show, the footnote simply explicated the Court's pendent jurisdiction to review purely legal questions on interlocutory appeal. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1946–47 (2009); *Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007). The fact that appellate courts may decide, on interlocutory appeal, that a cause of action includes an element as a matter of law does not mean that an officer alleged to have violated clearly established rights obtains immunity by virtue of doubts about the sufficiency of the evidence concerning that new element of the tort.

In sum, qualified immunity protects officers who act reasonably in the face of confusion, not those alleged to have violated clearly established rights through their own plainly illicit retaliatory animus, but are nonetheless saved from damages liability by the plaintiff's failure of proof on a distinct, policy-driven element of the judicially created tort—much less a merely "arguable" such failure.

D. Even If *Hartman* Is Understood To Confer A Type Of Immunity, "Arguable" Probable Cause Is Insufficient To Trigger It

For these reasons, *amicus* believes that *Hartman* is best understood as a refashioning of the *Bivens* cause of action in the retaliation context, and that failure to show an absence of probable cause should result in judgment for the defendant on the merits, not qualified immunity. But even if this Court would now view *Hartman*'s holding as a form of immunity, it is a unique form motivated by distinct policy concerns, and one that is triggered only by *actual* probable cause, not merely *arguable* probable cause.

Requiring retaliation plaintiffs to prove the absence of probable cause would prevent them from too readily invading the "subjective worlds" of officers who took only *objectively legitimate* action. *Crawford-El*, 523 U.S. at 605 (Rehnquist, C.J., dissenting). But granting immunity based on merely *arguable* probable cause would go much further—and much too far. It would result in the dismissal of some cases in which plaintiffs adduce enough evidence to prove that the defendant took *objectively baseless* adverse action for *forbidden* retaliatory reasons. Such a rule would not generate sufficient "societal benefit" to "outweig[h]" the "cost they create in terms of unremedied meritorious claims." *Id.* at 606.

So, even if the *Hartman* rule is incorrectly viewed as going to a defendant's immunity rather than simply to his tort liability, it is nevertheless triggered only by the actual existence of probable cause, not by the fact that an officer "reasonably but mistakenly" could have believed that probable cause existed.

II. BECAUSE THE *HARTMAN* RULE'S IMPLICATIONS FOR IMMUNITY DO NOT MATTER HERE, HOWEVER, THIS COURT NEED NOT RESOLVE THEM NOW

Having said all of this, however, *amicus* notes that the relationship between qualified immunity and the *Hartman* rule is unlikely to be implicated by this case. While the Court should be aware of the disagreement on this issue, there is no need to resolve it at this time, should the Court have any doubts about the argument presented above. Rather, resolution should await a case in which the issue is properly presented and matters to the outcome.

In this case, it is undisputed that—as a matter of law, and viewing all facts in the light most favorable to Respondent—there existed probable cause to arrest him. The court below held as much, and Respondent has not challenged or requested review of that finding. *See* Pet. App. 18a ("[T]here is no doubt that Agent Reichle possessed probable cause to arrest Mr. Howards for lying to a federal agent in violation of 18 U.S.C. § 1001."). If this Court concludes that the *Hartman* rule extends to the context of retaliatory arrest, such that the plaintiff must prove the absence of probable cause to win his *Bivens* suit, the result will therefore be an award of summary judgment for Petitioners. In other words, because probable cause *simpliciter* is conceded here, a new requirement to prove the absence thereof necessarily spells the end of this litigation *on the merits*. The question whether *arguable* probable cause might also be enough to dispose of such a case as a matter of *qualified immunity* does not ever arise.

Thus, even though Petitioners' brief repeatedly refers to qualified immunity and assumes that *Hartman* is a rule of immunity, Petitioners' principal argument does *not* depend on that assumption. Their principal argument is that *Hartman* applies to retaliatory arrests, *see* Pet. Br. at 13–22, 24–29; as explained, if that is true, Petitioners are entitled to judgment on the merits, because Respondent was unable to create a triable issue as to the absence of probable cause for his arrest. If Petitioners succeed on their primary argument, there is absolutely no need to address qualified immunity.

Petitioners also argue, in the alternative, that even if *Hartman* does *not* apply to retaliatory-arrest cases, they are entitled to qualified immunity for various reasons. Again, several of these arguments do *not* require, as their premise, any necessary relationship between the *Hartman* rule and the qualified-immunity defense. For example, Petitioners contend that they should be immune because it ought to be *permissible* for Secret Service agents to consider a suspect's speech when deciding whether he poses a threat to "the immediate physical safety of the President." Pet. Br. at 38. That argument goes directly to the legitimacy of Petitioners' conduct under the First Amendment, and therefore, unlike disputes over the scope or application of the *Hartman* rule of proof, *see* Pet. Br. at 41–43, 51–53, presents a plausible claim for immunity. Petitioners also ask for immunity based on confusion over the scope of absolute immunity in this area, *see* Pet. Br. at 43–45, and that likewise has nothing to do with the meaning of the *Hartman* rule.

In all events, however it may resolve Petitioners' various arguments, under no circumstances should this Court find it necessary to consider the consequences of "arguable" probable cause on a claim of qualified immunity, *see supra* Part I.D, because (as noted) *actual* probable cause exists and is not challenged here. There is therefore *no* reason for this Court to weigh in on that question in this case.

Because the record here shows there was probable cause, the consequences of "arguable" probable cause are not implicated, and the parties lack incentives to zealously litigate over the question. As such, the prudent course, in keeping with this Court's ordinary practice, would be to avoid deciding that question until faced with a case that properly presents it.

CONCLUSION

For the foregoing reasons, amicus respectfully urges this Court to heed, in its decision, the distinction between the boundaries of a constitutional right and the elements of a constitutional tort.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-262

In The Supreme Court of the United States

VIRGIL D. "GUS" REICHLE, JR., DAN DOYLE,
Petitioners,

v.

STEVEN HOWARDS,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN *AMICUS* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT

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MOTION OF THE RUTHERFORD INSTITUTE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Comes now The Rutherford Institute and files this motion pursuant to Sup. Ct. R. 37.3(b), for leave to file an *amicus curiae* brief in support of the Respondents in the above-styled case presently before this Court for oral argument.

In support of this motion, The Rutherford Institute first avers that it requested the consent to the filing of an *amicus curiae* brief from each of parties to this case, but written consent was not obtained from Respondent Steven Howards.

The Rutherford Institute requests the opportunity to present an *amicus curiae* brief in this

case because the Institute is keenly interested in protecting the civil liberties of individuals from interference and infringement by the government. The issue presented in this case, *i.e.*, the remedies available to citizens who are targeted for arrest by law enforcement officials because of the exercise of First Amendment rights, will have an important impact upon the freedom of individuals and organizations to engage in speech that is unpopular or critical of the government. These individuals and members of these groups have historically faced the wrath of government officials who desire to squelch criticism. If a remedy for retaliatory arrests is made practically unavailable, government officials will feel emboldened to target their critics and unpopular speech will be chilled. It is crucial that an effective deterrent remain in place to prevent invidious discrimination on the basis of the exercise of freedom of speech.

As a civil liberties organization, The Rutherford Institute and the brief set forth, *infra*, brings a discerning analysis to the issues presented in this case. The Institute specializes in protecting the constitutional rights of individuals and its experience in these matters will bring to light matters which will assist the Court in reaching a just solution to the questions presented.

Moreover, The Rutherford Institute specializes in advocating for individual rights and the proposed brief will allow the Court to better understand the interests of government critics in safeguarding their rights to expression. The Petitioners have already received the support of

three *amicus curiae* briefs, and the Court will obtain a more balanced analysis of the issues in this case if the Institute's brief in support of the Respondent is accepted.

Wherefore, The Rutherford Institute respectfully requests that its motion for leave to file an *amicus curiae* brief be granted.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 29 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion, or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The case now before the Court concerns the Institute because it will affect the ability of citizens to feel free to engage in open and robust political expression. Particularly when such speech is unpopular or critical of the government, citizens run the risk of government retaliation that will deter such speech in the future. If claims for retaliatory arrest do not remain a viable option for citizens, few, if any, checks will remain to deter government

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[1] No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel have contributed monetarily to its preparation or submission.

officials from employing intimidating tactics designed to chill the exercise of unpopular or critical political speech.

SUMMARY OF THE ARGUMENT

This Court has long adhered to the rule that, even with respect to decisions in which executive officers of the government have broad discretion, the Constitution forbids the law from being "applied and administered . . . with an evil eye and unequal hand" in derogation of individual rights enshrined in our fundamental law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Such invidious discrimination in the enforcement of laws is forbidden not only where the intent of officials is to discriminate on the basis of race, but also where it is based upon the exercise of the First Amendment right of expression. *See Wayte v. United* States, 470 U.S. 598, 608 (1985) ("In particular, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification, . . ., *including the exercise of protected statutory and constitutional rights*.") (emphasis added; citations and internal quotations omitted).

If this guarantee against invidious enforcement of the law is to remain a potent check upon the abuse of power by executive officials, this Court must reject the Petitioners' claim that to prevail on a First Amendment retaliatory arrest claim, a plaintiff is required to prove that the arresting officers lacked probable cause to arrest him or her. The retaliatory arrest claim under 42 U.S.C.

§ 1983 or *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), must remain available to protect against the chilling effect that retaliatory arrests create and to prevent third parties from experiencing such chilling effects. Its contours should be established so that it serves the same purpose as this Court's other protections against government actions that create chilling effects on First Amendment rights. Petitioners' suggested addition to the elements of the First Amendment retaliatory arrest cause of action would increase the difficulty of a plaintiff's prevailing on a retaliatory arrest claim to the point of deterring nearly all such claims and sharply curtailing the protections that this Court has put in place against chilling effects on First Amendment rights.

Protecting against chilling effects is particularly important in the present case. The ability of citizens to communicate with the President, the Vice President, and presidential candidates is embodied within the First Amendment's right to petition the government and is a fundamental attribute of American democracy. Without the deterrent effect upon law enforcement officials the retaliatory arrest cause of action provides, citizens will be less willing to engage in this direct communication and will self-censor the subjects that they discuss. Self-censorship, the result of a chilling effect, harms the President, the Vice President, and presidential candidates.

ARGUMENT

I. Claims Under the First Amendment for Retaliatory Arrest Deter Government Officials from Imposing Chilling Effects on Speech

A. The First Amendment Protects Against Chilling Effects

In order to realize fully the guarantee to freedom of speech contained in the First Amendment, that provision has been construed to prevent not only outright censorship and prior restraints, but also chilling effects on speech. Restrictions on speech run afoul of the First Amendment when they produce a fear of punishment or sanction that inhibits the exercise of protected speech, even if the restrictions would otherwise be permissible.

This Court has recognized chilling effects broadly in First Amendment contexts. As long as it is not purely subjective, a chilling effect on First Amendment rights constitutes injury-in-fact for the purposes of Article III standing. *Younger v. Harris*, 401 U.S. 37, 42 (1971); *cf. Meese v. Keene*, 481 U.S. 465, 473 (1987). A chilling effect provides the substantive basis for facial overbreadth challenges to statutes and regulations inhibiting speech. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255–57 (2002); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). This Court has concluded that plaintiffs need not risk arrest in order to bring claims seeking to vindicate and protect First Amendment rights. *See Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

Further, because of the chilling effect created by the prospect of civil liability for defamation, this Court has imposed constitutional restraints on the imposition of liability for libel and slander. Thus, heightened standards of proof apply in defamation actions which either involve public officials and figures, *New York Times Co. v. Sullivan*, 376 U.S. 254, 300–01 (1964) (Goldberg, J., concurring), or which involve speech on matters of public concern. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

B. Retaliatory Arrest Claims Protect Against Chilling Effects

The availability of claims for retaliatory arrest serves to prevent and deter the government from imposing a chilling effect upon the speech of citizens. As such, it serves the same First Amendment interests as this Court's other chilling effect jurisprudence. Indeed, a chilling effect is an element of the retaliatory arrest tort. To prevail, a plaintiff must prove, *inter alia*, that "the government's actions caused [the plaintiff] injury that would chill a person of ordinary firmness from continuing to engage in" the protected First Amendment activity engaged in by the plaintiff. *Howards v. McLaughlin*, 634 F.3d 1131, 1144 (10th Cir. 2011). The cause of action does not primarily protect against any violation of First Amendment rights that attends an arrest, but is intended to reach government conduct that would have the effect of chilling others' current and future exercise of their First Amendment rights.

As such, the retaliatory arrest's purpose is prospective in nature. Recognition of a retaliatory arrest cause of action serves as a deterrent upon law enforcement officials who might use their power to prevent and intimidate persons from criticizing the government. It is, of course, an action for damages, but it only awards damages to the plaintiff who was actually injured by the retaliatory arrest to the extent that the award of damages cures the chill on third parties' First Amendment free speech rights. The tort deters government agents from making arrests on account of the content of speech so that non-parties to the lawsuit need not risk arrest in order to vindicate their First Amendment rights.

C. Requiring That an Absence of Probable Cause Be Established by a Plaintiff Would Prevent the First Amendment Retaliatory Arrest Claim from Protecting Against Chilling Effects

Adding a "no probable cause" requirement to to elements of a retaliatory arrest claim is inconsistent with this Court's chilling effect jurisprudence and will limit the tort's protections of First Amendment rights.

When this Court has enjoined the enforcement of overbroad statutes and regulations that produce chilling effects, it has done so on the basis of the chill that they produced. This Court has not required those challenging the laws to have been arrested without probable cause and prosecuted in order to issue an injunction. Rather, the presence of a chilling effect has been sufficient to lead this Court to enjoin the enforcement of such

statutes and regulations. In *Ashcroft v. Free Speech Coalition*, for example, this Court found overbroad provisions of the Child Pornography Prevention Act of 1996 to be unconstitutional, even though the plaintiffs had not been arrested pursuant to the Act. *Free Speech Coalition*, 535 U.S. at 258.

Further, in *Younger v. Harris*, where this Court considered whether a criminal defendant had standing to challenge on First Amendment grounds the statute under which he was being prosecuted, this Court concluded that the violation of his First Amendment rights constituted cognizable injury even though he did not prove that he had been arrested without probable cause. *Younger*, 401 U.S. at 42.

Adding a "no probable cause" requirement to the elements of the retaliatory arrest claim would change the purpose the claim is meant to serve. If the Petitioners' argument is followed and the reasoning of *Hartman v. Moore*, 547 U.S. 250 (2006), extended to retaliatory arrest claims, such actions would emphasize—and seek to correct—the harm to the individual plaintiff from a wrongful arrest more than it would protect the public from the violations of their First Amendment rights. The additional element that Petitioners propose deals specifically with the facts and circumstances of the arrest. It requires additional retrospective inquiry not only into the arrest itself, but also into the plaintiff's conduct at the time of the arrest. In doing so, it redefines the claim's understanding of injury from an arrest that would chill the exercise of First Amendment rights to an arrest that would both chill

First Amendment rights *and* was actually effected in a particular manner, without probable cause.

Such a proposal is an attempt to make First Amendment retaliatory arrest protect the same interests already protected by the common law tort of false arrest and a constitutional claim under the Fourth Amendment, namely, injury to the plaintiff because of an unreasonable arrest without probable cause. However, the tort of First Amendment retaliatory arrest should be tailored and defined in a way that protects interests other than the plaintiff-arrestee's right to be free from an unreasonable arrest, *i.e.*, the right to be free from government targeting because of one's exercise of First Amendment rights. Only then will the existence of the retaliatory arrest cause of action serve to deter the application and enforcement of the law with an "evil eye" toward suppressing or punishing speech. In this case, under Petitioners' proposal, the result of litigation would turn on the absence of probable cause, rather than on what the tort has been designed to protect, namely First Amendment rights. Those whose First Amendment interests have been chilled because of the Secret Service's arrest of Howards would continue to be chilled with respect to these rights.

In imposing a requirement that plaintiffs in retaliatory prosecution actions show that there was no probable cause to prosecute for the specific offense with which they were charged, this Court reasoned in *Hartman*, 547 U.S. at 265, that such a showing would be effectively "cost free." Here, Petitioners proposed no probable cause requirement

would be far from cost free. It would add substantially to the plaintiff's burden and likely would prevent almost any plaintiff from prevailing on a retaliatory arrest claim or attempting to prove this element. As the facts of this case show, where the Petitioners claim they were justified in arresting the Respondent for a federal crime because Respondent inaccurately stated he had not touched the Vice President, it is difficult to steer clear of any conduct that can be plausibly deemed a crime, especially in the face of officers determined to retaliate and intimidate persons expressing critical or unpopular views. This is even more difficult for persons who are passionate about their views and are compelled to enter the public arena to do so.

The Petitioners and the United States have argued, and the Tenth Circuit understood, that the proposed "no probable cause" element would require the plaintiff to show that, at the time of the arrest, there was no probable cause to arrest the plaintiff not for the crime for which he or she was arrested, but for *any* crime.[2] Effectively, this would require the plaintiff to prove not just that he or she was innocent of every existing crime at the time of the arrest, but that there was no reason even to believe that he or she committed any crime at all. Even a

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[2] As the Tenth Circuit noted: "[Agents Reichle and Doyle] assert that '[i]f an officer had probable cause to arrest a plaintiff for *any crime*, it is irrelevant that a plaintiff may have engaged in protected speech prior to or during the arrest.'" *Howards v. McLaughlin*, 634 F.3d 1131, 1145 (10th Cir. 2011) (quoting Reichle/Doyle Br. at 15) (emphasis added); *see also* Brief of the United States at 30–31.

focused, *Hartman*-like requirement would increase the plaintiff's burden and would deter most plaintiffs from pursuing litigation. The effort and expense involved with making such a showing with respect to every crime would deter all but the most ardent plaintiffs from bringing retaliatory arrest claims.

II. The Freedom of Citizens to Engage and Petition Leaders and Candidates Will Suffer If the Availability of the Retaliatory Arrest Cause of Action Is Restricted

Direct contact between senior government officials and individual, private citizens characterizes American government. Such direct contact has both constitutional and political foundations. The First Amendment guarantees citizens the right to petition at the very least the Legislative and Executive branches, as Justice Scalia has recently observed. *See Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring) ("There is abundant historical evidence that 'Petitions' were directed to the executive and legislative branches of government [.]"). This right has no clearer expression than in petitions made directly and in person to senior officials. Indeed, this is just the situation embodied in the petition that led to the Magna Carta. *See id.* at 2499 (majority opinion).

Direct contact between the holders of high government office and private citizens is further rooted in the democratic nature of American government. Citizens vote for their Representatives to Congress and their Senators. The President and Vice President are elected after a nationwide, popular election and also after nationwide party nominating contests. Responsiveness to citizen concerns is the hallmark of American government. With the exception of term-limited Presidents, elected officials retain their positions only with the continued support of the people who elect them. Candidates for office only prevail after convincing individual citizens to vote for them.

Even in an age of social media and television advertisements, direct citizen contact has retained its importance for office-holders and candidates alike and remains a fundamental part of American political life. Indeed, such direct citizen contact is an essential feature of the presidency of Barack Obama. As the White House website describes a recent presidential bus tour:

> From August 15-18, President Obama traveled through the Midwest, meeting with Americans in rural towns and communities in Minnesota, Iowa and Illinois. The purpose of his trip, dubbed the Economic Rural Tour 2011, was to talk to people from different walks of life about what is happening in our country right now. The President was there to talk, but also to listen.

Rural Bus Tour 2011, The White House, http://www.whitehouse.gov/administration/eop/rural-council/rural-tour-2011 (last visited Feb. 22, 2012).

Direct citizen contact is no less essential for candidates for office. In the early party nominating contests, in the Iowa Caucuses and the New Hampshire Primary, candidates campaign substantially by greeting and interacting with citizens, one-on-one or in small groups, in coffee shops and restaurants. Office holders and candidates do not meet directly with citizens with the expectation that citizens will agree fully with policies that they promote or whose adoption they urge. Rather, they meet with citizens with the understanding that they are—or hope to become—public servants and must learn about the concerns of citizens in order to serve them.

Chilling this activity strikes at the very core of the American tradition of representative democracy. It deprives citizens of their right to petition and it also deprives office holders and candidates from learning the true concerns of those who will choose whether to cast votes in favor of them. A President cannot respond to a concern that a citizen is afraid to share with him, and a candidate cannot promise to fix a problem if citizens are afraid to say that it exists.

Allowing Secret Service agents to arrest a citizen with impunity because of the content of political speech that he or she engages in with the President, the Vice President, or presidential

candidates, simply because some plausible ground exists for the arrest, will produce just such a chilling effect. In the present case, the Tenth Circuit recognized that Howards alleged cognizable First Amendment injury for the purposes of the retaliatory arrest tort, and Petitioners do not challenge the Tenth Circuit's conclusion before this Court. *See Howards*, 634 F.3d at 1144.

More broadly, the citizen of ordinary firmness cannot know when the actions that he or she takes when speaking to the President, Vice President, or presidential candidates will legally constitute probable cause. A complex set of laws surrounds the protection of the President and Vice President. *See* 18 U.S.C. § 871; *see also* 18 U.S.C. § 3056. They are protected from assault and threats far more than are private citizens. The average citizen, however, has no reason to familiarize himself or herself with the exact contours of these laws—meeting the President or Vice President is not an ordinary event for most—and cannot be charged with knowing the *legal* standard for what constitutes probable cause for arrest pursuant to them. Not knowing the contours of these laws, but learning that the law allows the Secret Service to make retaliatory arrests, so long as they are justified by probable cause, the citizen of ordinary firmesss will, in order to avoid arrest, have to avoid giving offense to the Secret Service.

To be sure, the Secret Service serves an essential purpose, protecting the President, the Vice President, presidential candidates, and others. *See* 18 U.S.C. § 871. As *amici* point out, such protection

is necessary. *See* Brief of the United States at 20. However, the Secret Service does not protect the President or the Vice President simply for the purpose of ensuring that they are secure in their persons. This could be achieved by removing them to secluded, undisclosed locations. *See* Ed Pilkington, *Inside the World of Obama's Secret-Service Bodyguards*, The Guardian (March 7, 2010), http://www.guardian.co.uk/world/2010/mar/08/obama-secret-service-bodyguards (last visited Feb. 22, 2012) (quoting a former Secret Service agent who protected President Reagan as saying "The secret service would want to take the president to Camp David straight after the inauguration and keep him there out of any contact with the public for the next four years. But they know that's not possible"). Rather, the Secret Service protects the President and the Vice President so that they can fulfill their constitutionally and politically mandated duties, including responding to citizen concerns and meeting directly with citizens. Indeed, the Secret Service itself recognizes this principle: It provides its agents with specialized training so that they can protect the President, Vice President, presidential candidates, and other protectees in public. *See United States Secret Service: Frequently Asked Questions*, United States Secret Service, http://www.secretservice.gov/faq.shtml#faq23 (last visited Feb. 22, 2012) (describing the training received by Secret Service agents). Likewise, this Court should recognize and affirm this principle.

CONCLUSION

As a practical matter, the prospect of a civil action for retaliatory arrest is the only deterrent against law enforcement officers who desire to intimidate citizens who engage in critical or unpopular speech and chill that expression. Limiting that cause of action to situations where officers have no probable cause for an arrest on any basis will virtually eliminate that deterrent. This Court has long recognized that even facially-legitimate exercises of government authority must be limited if there is a danger it is being used to curtail or inhibit the expressive and associational activities of politically unpopular groups. *See Gibson v. Fla. Leg. Investigation Comm.*, 372 U.S. 539, 556-57 (1963) and *Button*, 371 U.S. at 435-36 (recognizing that the civil rights movement engendered intense resentment and that even a statute even-handed in its terms may become a weapon for oppression). In order to preserve and protect that principle, this Court should affirm the judgment and opinion below and reject the idea that arrests in retaliation for the exercise of First Amendment rights are actionable only if undertaken without probable cause.

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